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No. _____ 08 12 7 8 APR 14 2009

In The

Supreme Court of the United States

LYNN MAGNANDONOVAN,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Five

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a judgment by a three-judge panel of appellate justices depends on the strength and credibility of trial testimony by another justice of the same appellate court, does the panel's failure to recuse itself raise the constitutional due process issue currently pending before this Court in *Caperton v. A.T. Massey Coal Company, Inc.*, No. 08-22, so that the Court should either grant certiorari or vacate the judgment and remand the case for further consideration in light of the Court's forthcoming decision in *Caperton*?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below are the petitioner-plaintiff Lynn Magnandonovan and the respondent-defendant City of Los Angeles. This petition is not filed by or on behalf of a nongovernmental corporation.

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PETITION FOR A WRIT OF CERTIORARI

Plaintiff Lynn Magnandonovan respectfully submits this petition for a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division Five, filed in the above-entitled proceeding on October 29, 2008 (of which the California Supreme Court denied review on February 11, 2009), reversing a judgment for plaintiff for retaliatory employment discrimination.

OPINION BELOW

The opinion of the California Court of Appeal is not published and is reproduced in the Appendix (App.) filed herewith. App. 1-57. The order of the California Court of Appeal denying recusal and a rehearing is also unreported and is reproduced in the Appendix filed herewith. App. 58-59.

JURISDICTION

The California Court of Appeal entered judgment on October 29, 2008. App. 1. That court denied a timely petition for rehearing on November 14, 2008. App. 58. The California Supreme Court denied a petition for review on February 11, 2009. App. 63.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This petition for a writ of certiorari involves the Fourteenth Amendment to the U.S. Constitution, which provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In this retaliatory employment discrimination case, a two-judge majority of the California Court of Appeal, with one justice dissenting, expressly re-weighed live witness trial testimony to overturn a jury verdict because – in the majority's view – the defendant's evidence was "strong" while the plaintiff's evidence was "weak." App. 21, 28, 49. The majority relied on the three-stage burden-shifting test set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), under which, according to *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000) and *Guz v. Bechtel National, Inc.,* 24 Cal.4th 317 (2000), an appellate court may re-weigh documentary evidence in an employment discrimination case on a motion for summary judgment.[1]

[1] The majority failed to follow that same court's holding in *Caldwell v. Paramount Unified School Dist.,* 41 Cal.App.4th 189, 204 (1995), that the *McDonnell Douglas* test "'drops from the case'" if and when "the case is submitted to the jury."

The justices of the California Court of Appeal should have recused themselves because their decision depended on the majority's subjective assessment of the strength and credibility of trial testimony by another justice of the same appellate court who, while previously a trial judge, had testified against plaintiff at her trial. Regardless of the absence of any *actual* impropriety, recusal was required to avoid an *appearance* of impropriety.

Plaintiff Lynn Magnandonovan initially requested recusal by letter to the California Court of Appeal dated January 10, 2007. The court denied the request by letter dated January 18, 2007. App. 64-66. After the court issued its judgment, plaintiff again requested recusal in a petition for rehearing dated November 6, 2008. The court again denied recusal in an order denying the petition for rehearing. App. 58-59.

In a case currently pending before this Court – *Caperton v. A.T. Massey Coal Company, Inc.*, No. 08-22 – the Court will decide whether an appellate justice's failure to recuse himself from participating in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment by creating an *appearance* of bias. The decision in *Caperton* will likely determine whether recusal was required in the present case. Petitioner therefore respectfully requests that this Court either (1) grant certiorari or (2) postpone consideration of this petition until the Court issues its decision in *Caperton* and then vacate the judgment of the California Court of

Appeal and remand the case to that court for further consideration in light of this Court's decision in *Caperton*.

REASONS FOR GRANTING THE PETITION

I. THE CALIFORNIA COURT OF APPEAL SHOULD HAVE RECUSED ITSELF DUE TO AN APPEARANCE OF IMPROPRIETY BECAUSE THE COURT'S DECISION DEPENDED ON THE STRENGTH AND CREDIBILITY OF TRIAL TESTIMONY BY A JUSTICE OF THAT COURT.

This case was filed in the Los Angeles County Superior Court. Because the trial witnesses included several sitting Los Angeles County Superior Court judges, that entire court recused itself – the appearance of impropriety being obvious – and the matter was tried before a judge of the Orange County Superior Court. A jury rendered a verdict for plaintiff Lynn Magnandonovan against defendant City of Los Angeles in the sum of $1,525,938 for retaliatory employment discrimination. Defendant appealed.

At the outset of the appeal, on January 10, 2007, plaintiff's trial counsel wrote to California Court of Appeal Second Appellate District Administrative Presiding Justice Roger W. Boren and Division Five Presiding Justice Paul Turner requesting that the Second Appellate District recuse itself because a member of that court, Justice Laurie Zelon, while still

a judge of the Los Angeles County Superior Court, had testified against plaintiff at trial, so that a person aware of the facts might reasonably entertain a doubt that the justices of the Second Appellate District would be able to be impartial.

Presiding Justice Turner responded by letter dated January 18, 2007. The letter stated:

> After reviewing the facts as they are now evident, I have concluded that a person aware of the facts, including the states of minds of the four Division Five justices, would *not* entertain a doubt as to our capacity to remain impartial. At present the Division Five justices decline to recuse themselves. If facts develop at a later date that cause any or all of us to change our minds, we will of course individually or collectively recuse ourselves.

App. 65.[2]

During the Court of Appeal's decision-making process, facts did indeed develop that should have caused the court to recuse itself – facts that would lead "a reasonable person aware of the facts [to] doubt the [court's] ability to be impartial." Cal. Code Jud. Ethics, Canon 3E(4)(c). Relying on the *Mc-Donnell*

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[2] Under California law, the appellate court's refusal to recuse itself was not subject to review; only the court's decision on the merits was reviewable. *See Kaufman v. Court of Appeal*, 31 Cal.3d 933, 938-940 (1982).

Douglas burden-shifting test, the majority determined that it would re-weigh the trial evidence in assessing its sufficiency to support the judgment. *See* App. 15-23, 28. The majority then relied in part on the strength and credibility of Justice Zelon's testimony against plaintiff to reverse the judgment for insufficiency of the evidence. *See* App. 38-39, 46-47.

The majority's inevitable respect for their colleague Justice Zelon would lead a reasonable person to doubt the court's ability to be impartial in assessing the trustworthiness of that testimony. The justices should have recused themselves on the ground that "[a] judge must avoid all impropriety and *appearance of impropriety*." ABA Model Code of Judicial Conduct, Canon 2(A) cmt., emphasis added; *cf., e.g.*, Tex. R. Civ. P. 18b(2)(2) (judges shall recuse themselves when a lawyer with whom they previously practiced had been a material witness in the case).

"[A]ny tribunal permitted by law to try cases and controversies must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). Appellate courts especially must take great care to avoid an appearance of bias, because of their function of assuring "'the uniform treatment of similarly situated persons that is the essence of the law itself.'" *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (quoting concurring opinion of Breyer, J. in *BMW of North America, Inc. v. Gore*, 527 U.S. 559, 587 (1996). Where the "appearance of bias" is serious enough to create a "probability" that the judge is

actually biased against a litigant, the Due Process Clause of the Fourteenth Amendment requires the judge's recusal, even if there is insufficient evidence to establish that the judge is subjectively biased. *In re Murchison*, 349 U.S. 133, 136 (1955); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). This constitutional requirement applies in civil as well as criminal cases. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

II. THIS COURT SHOULD EITHER GRANT CERTIORARI OR VACATE THE JUDGMENT OF THE CALIFORNIA COURT OF APPEAL AND REMAND THE CASE FOR FURTHER CONSIDERATION IN LIGHT OF THIS COURT'S FORTHCOMING DECISION IN *CAPERTON V. A.T. MASSEY COAL COMPANY, INC.*

In a case currently pending before this Court – *Caperton v. A.T. Massey Coal Company, Inc.*, No. 08-22 – the Court will decide whether an appellate justice's failure to recuse himself from participating in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment by creating an *appearance* of bias. The case was argued on March 3, 2009.

This Court's decision in *Caperton* will likely determine whether recusal was required under the circumstances of the present case. For that reason, this Court should either grant certiorari or vacate the judgment of the California Court of Appeal and

remand the case to that court for further consideration in light of this Court's decision in *Caperton*.

CONCLUSION

For the foregoing reasons, this Court should either (1) grant certiorari or (2) postpone consideration of this petition until the Court issues its decision in *Caperton* and then vacate the judgment of the California Court of Appeal and remand the case to that court for further consideration in light of this Court's decision in *Caperton*.

Respectfully submitted,

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

LYNN MAGNANDONOVAN, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Appellant.	B192892 (Los Angeles County Super. Ct. No. BC286908) (Filed Oct. 29, 2008)

APPEALS from a judgment of the Superior Court of Los Angeles County, W. Michael Hayes, Judge. (Assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed with directions.

Eisenberg and Hancock, Jon B. Eisenberg, William N. Hancock; Samuel J. Wells; and Michael P. King, for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney (Los Angeles County), and Claudia McGee Henry, Senior Assistant City Attorney, for Defendant and Appellant.

I. INTRODUCTION

In *People v. Hill* (1998) 17 Cal.4th 800, 819-820, Associate Justice Kathryn Mickle Werdegar, speaking for a unanimous Supreme Court wrote: "Prosecutors . . . are held to an elevated standard of conduct. 'It is the duty of every member of the bar to "maintain the

respect due to the courts" and to "abstain from all offensive personality." (Bus. & Prof. Code, § 6068, subds. (b) and (f).) A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. (*People v. Kelley* (1977) 75 Cal.App.3d 672, 690.) As the United States Supreme Court has explained, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.]' [Citations.]" Here, we address a retaliation case in which plaintiff, a now terminated deputy city attorney, among other things admitted she angrily threatened a superior court commissioner that he would have to answer to his creator for a judicial ruling.

Defendant, the City of Los Angeles, appeals from a judgment, after a jury trial, in favor of plaintiff, Lynn Magnandonovan. Defendant contends: plaintiff failed to exhaust her administrative remedies under the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.) and Labor Code section 1102.5; plaintiff failed to comply with the Government Claims Act (Gov. Code, § 810 et seq.); and there was

no substantial evidence defendant's reasons for discharging plaintiff were a pretext for retaliation. Plaintiff appeals from the judgment solely with respect to attorney fees. We conclude: defendant, a public entity, is not subject to liability on a common law wrongful discharge in violation of public policy claim; defendant waived its exhaustion arguments; a Fair Employment and Housing Act cause of action is not subject to the government claim requirement; and defendant presented strong, uncontradicted evidence of a legitimate, non-retaliatory reason for discharging plaintiff, in the face of which plaintiff's weak pretext evidence was insufficient as a matter of law to support a reasonable inference of intentional retaliation; therefore, the judgment must be reversed with directions to enter a judgment in defendant's favor. Plaintiff's appeal relating to attorney fees thus has no merit.

II. BACKGROUND

Plaintiff joined the Los Angeles City Attorney's office as a law clerk in 1987 and as a Deputy City Attorney I in 1990. She received "paygrade" advances to Deputy City Attorney II in 1992 and to Deputy City Attorney III in 1998. On March 22, 2001, plaintiff filed an administrative complaint with the Department of Fair Employment and Housing alleging harassment and discrimination on the basis of gender, race, and national origin. The administrative complaint was settled on May 2, 2001. The settlement agreement provided, among other things, "[Plaintiff]

shall be appointed the attorney in and supervisor over the newly established Hate Crimes Unit within the Criminal Branch of the [city attorney's office]." Nearly eight months later, on December 20, 2001, plaintiff was placed on paid administrative leave. This followed an incident in which plaintiff said a superior court commissioner would have to answer to his creator for a judicial ruling she disliked. Plaintiff filed a second administrative complaint on May 1, 2002, and received a right to sue letter. In her second administrative complaint, plaintiff alleged, "I believe I was subjected to employment discrimination and a hostile work environment because of my sex (female), race (Caucasian), and national origin (American) and in retaliation for complaining of discrimination and harassment and filing and resolving a claim pursuant to the Fair Employment and Housing Act." Also on May 1, 2002, plaintiff filed a government claim. On June 12, 2002, plaintiff's claim was denied. Defendant issued a June 28, 2002 notice of proposed termination. This was followed by a November 6, 2002 revised notice. Plaintiff filed this lawsuit on December 12, 2002. She was discharged one year later, on December 29, 2003.

The operative pleading is a March 19, 2004 third amended complaint. It contains six causes of action: gender discrimination in violation of the Fair Employment and Housing Act; retaliation in violation of the Fair Employment and Housing Act; retaliation in violation of public policy (Cal. Const., art. I, § 8; Fair Employment and Housing Act; Labor Code, § 1102.5;

Los Angeles Admin. Code, Div. 4, Ch. 7, Art. 9.5; and 42 U.S.C. § 1983); discrimination and harassment in violation of public policy; intentional severe emotional distress infliction; and injunctive relief. The matter went to trial, however, only on two retaliation causes of action – in violation of the Fair Employment and Housing Act and in violation of public policy. The jury was instructed: "[Plaintiff's] claims for gender discrimination and harassment in violation of [the Fair Employment and Housing Act], discrimination and harassment in violation of public policy, intentional infliction of emotional distress, slander per se, invasion of privacy, declaratory relief and for an injunction are no longer issues in this case."

III. DISCUSSION

A. Defendant, A Public Entity, Is Immune From Liability On A Common Law Wrongful Discharge In Violation Of Public Policy Claim

It was error to submit the common law retaliation in violation of public policy cause of action to the jury. A common law claim for wrongful discharge in violation of public policy is unavailable against a public entity such as defendant. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 898-899.) Defendant noted this issue in a footnote to its new trial motion stating, "Plaintiff's public policy claim is also barred based on governmental immunity. *Kemmerer v. County of Fresno,* 200 Cal.App.3d 1426 (1988)." As discussed below, however, the error

does not require that the judgment, insofar as it is premised on a violation of the Fair Employment and Housing Act, be reversed.

Under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170, a common law tort action lies for wrongful discharge in violation of a firmly established public policy. This includes the public policies reflected in the Fair Employment and Housing Act. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1160-1161 [disability discrimination]; *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 897 [age discrimination].) In *Miklosy v. Regents of University of California, supra,* 44 Cal.4th at pages 898-899, however, our Supreme Court held a *Tameny* claim does not lie against a public entity. (Accord, *Ross v. San Francisco Bay Area Rapid Transit Dist.* (2007) 146 Cal.App.4th 1507, 1514; *Palmer v. Regents of University of California* (2003) 107 Cal.App.4th 899, 909; *see Kemmerer v. County of Fresno, supra,* 200 Cal.App.3d at p. 1437.) As noted above, this case was tried on two causes of action-retaliation in violation of the Fair Employment and Housing Act and a violation of fundamental public policy. The cause of action for retaliation in violation of public policy is a common law claim under *Tameny.* But a public policy violation claim does not lie against defendant, a public entity. (*Miklosy v. Regents of University of California, supra,* 44 Cal.4th at pp. 898-899; *Ross v. San Francisco Bay Area Rapid Transit Dist., supra,* 146 Cal.App.4th at p. 1514; *Palmer v. Regents of University of California, supra,* 107 Cal.App.4th at p. 909.)

But the error in submitting the *Tameny* cause of action to the jury does not require that the judgment be reversed insofar as it is premised on the Fair Employment and Housing Act. It is the general rule that, "[A] judgment will not be reversed on appeal if there is substantial evidence to support the verdict on any theory on which it might have been reached." (*Clement v. State Reclamation Bd.* (1950) 35 Cal.2d 628, 643, limited by *Albers v. Los Angeles County* (1965) 62 Cal.2d 250, 262, as discussed in *Belair v. Riverside County Flood Control District* (1988) 47 Cal.3d 550, 562-563; accord, *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673 [stating general rule]; *Gillespie v. Rawlings* (1957) 49 Cal.2d 359, 368-369,disapproved on another point in *Nevarez v. Carrasco* (1969) 1 Cal.3d 518, 522, as explained in *Bozanich v. Kenny* (1970) 3 Cal.3d 567, 570-571 [evidence supported one of two theories that went to the jury; error not prejudicial].) As explained in *Rather v. City & County of San Francisco* (1947) 81 Cal.App.2d 625, 636: "It is settled law that 'a general verdict imports findings in favor of the prevailing party on all material issues, and if upon such a verdict one issue alone is sustained by the evidence and is not affected by any error, the want of evidence to sustain the finding on the other issues or any errors committed in regard to them cannot be prejudicial.' (2 Cal.Jur., p. 1029. *See, also,* 24 Cal.Jur., p. 885.)" (Accord, *Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149, 1153.) The special verdict form did not ask the jury to find separately on the two causes of action at issue. If we were to conclude there was

sufficient evidence to support the retaliation in violation of the Fair Employment and Housing Act claim, then the jury's verdict would stand.

B. Defendant Waived Any Claim Of Failure To Exhaust Administrative Remedies

1. Fair Employment and Housing Act

Defendant argues: plaintiff failed to exhaust her Fair Employment and Housing Act administrative remedies as to her statutory retaliation claim; she filed her administrative complaint prior to the date on which her employment was terminated, and her administrative complaint did not allege retaliatory discharge. Plaintiff counters that defendant waived this issue by failing to raise it except by a footnote in its new trial motion. We agree.

Exhaustion of Fair Employment and Housing Act administrative remedies before the Department of Fair Employment and Housing is a prerequisite to a civil action under the Fair Employment and Housing Act. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 395-396; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 83-84.) But there is a split of authority in the Courts of Appeal as to whether failure to exhaust administrative remedies is a waivable defect, or whether it is jurisdictional in the sense that it is nonwaivable. In *Hood v. Hacienda La Puente Unified School Dist.* (1998) 65 Cal.App.4th 435, 440-441, we, in dicta, described the failure to exhaust administrative remedies as a nonwaivable jurisdictional defect.

In *Hood,* the plaintiff alleged he was a whistleblower who suffered retaliatory employment actions. The administrative remedy at issue arose under Government Code section 8547.8. We cited Supreme Court authority including *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291-293, and *Sampsell v. Superior Court* (1948) 32 Cal.2d 763, 773, disapproved on other grounds in *Robinson v. Superior Court* (1950) 35 Cal.2d 379, 385, 386-387. We noted there was a split in the decisional authority as to the waiver question. We concluded, "We need not resolve the foregoing dispute in the decisional authority. In the present case, the issue was raised in the trial court and has been preserved." (*Id.* at p. 441.) Notwithstanding our unwillingness to resolve the split in the decisional authority, *Hood* has subsequently been cited for the proposition that, "Failure to exhaust administrative remedy is a jurisdictional defect that may be raised at any time by the parties or the court." (*Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749, 770 [Gov. Code, § 8547.12].)

The weight of authority, however, is to the effect that the failure to exhaust administrative remedies is a waivable defect. *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 219-222, is the leading case for that proposition. The appeal in *Green* was from a jury verdict for the former city employee in a wrongful termination action. The employee had failed to exhaust his administrative remedies under an agreement between defendant and a city employees'

association. The Court of Appeal for the Fourth Appellate District, Division One, noted: "It is clear that Green did not challenge his discharge except by this lawsuit. It is equally clear the City failed to pursue the [exhaustion] argument even when invited to do so by the trial court. The issue we must confront, then, is whether the City can waive the defense of a failure to exhaust administrative remedies." (*Id.* at p. 219.) The Court of Appeal further explained: *Abelleira v. District Court, supra,* 17 Cal.2d at pages 287-293, does not stand for the proposition that failure to exhaust administrative remedies involves subject matter jurisdiction; *Abelleira* discussed jurisdiction solely in the context of when a writ of prohibition will issue; and "*Abelleira* makes it abundantly clear that the exhaustion doctrine does *not* implicate subject matter jurisdiction but rather is a 'procedural prerequisite' [that is] 'jurisdictional' only in the sense that a court's failure to apply the rule in a situation where the issue has been properly raised can be corrected by the issuance of a writ of prohibition." (*Green v. City of Oceanside, supra,* 194 Cal.App.3d at p. 222). The *Green* court held jurisdiction is a flexible dogma the application of which requires a case-by-case analysis. (*Ibid.*) The Court of Appeal concluded: "[W]e do not know whether Green failed to pursue his administrative remedies because he believed it would be futile to do so. Perhaps the City agreed, initially, but having lost its case before a jury has now reconsidered that judgment call. We think it would be grossly unfair to allow a defendant to ignore this potential procedural defense at a time when facts and

memories were fresh and put a plaintiff to the time and expense of a full trial, knowing it could assert the failure to exhaust administrative remedies if it received an adverse jury verdict. The exhaustion doctrine is simply a 'procedural prerequisite' (*Abelleira, supra,* 17 Cal.2d at p. 288) the City decided to forego. Having elected to put Green to his proof before a jury, the City's dissatisfaction with that result is an insufficient reason for reversal." (*Green v. City of Oceanside, supra,* 194 Cal.App.3d at p. 222-223.)

Green has been followed in: *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 133-138 (Lab. Code, § 1102.5); *Holland v. Union Pacific R. Co.* (2007) 154 Cal.App.4th 940, 946 (Fair Employment and Housing Act); *Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 895-901 (Fair Employment and Housing Act); *Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 66-67 (tax refund claim); *Doster v. County of San Diego* (1988) 203 Cal.App.3d 257, 259-260 (sheriff's department manual of policies and procedures); *see Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1215-1216 (dictum); *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080 (exhaustion doctrine, which is grounded on administrative autonomy and judicial efficiency concerns, is subject to exceptions); and *Styne v. Stevens* (2001) 26 Cal.4th 42, 58 (purpose of exhaustion doctrine is to reduce burden on courts while benefiting from agency expertise).

We conclude defendant waived its argument plaintiff failed to exhaust her administrative remedies by failing to raise and litigate the argument during the trial. Defendant notes its answer included, as an affirmative defense, failure to state a cause of action. Defendant cites *Horacek v. Smith* (1948) 33 Cal.2d 186, 191, for the proposition it can raise failure to exhaust administrative remedies at any time, including for the first time on appeal. *Horacek* was a contract breach action in which the Supreme Court held, "The objection that a complaint does not state facts sufficient to constitute a cause of action may be raised at any stage of the proceedings and, even for the first time upon appeal. (Code Civ. Proc., § 434 [*see now* § 430.80, subd. (a)].)" (*Ibid.*) *Horacek* did not consider and is not authority for the proposition that the failure to exhaust administrative remedies under the Fair Employment and Housing Act is a defect that may be raised at any time. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 243 ["It is axiomatic that an opinion is not authority for an issue not considered therein"]; *People v. Banks* (1993) 6 Cal.4th 926, 945 [same].)

2. Labor Code Section 1102.5

Defendant argues plaintiff was required to exhaust internal administrative remedies as a prerequisite to

her Labor Code section 1102.5 claims.[1] We need not address this argument at length. First, as discussed above, defendant waived the exhaustion issue by failing to timely raise it. Second, also as discussed above, plaintiff's claim for retaliation in violation of

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[1] Labor Code section 1102.5 states: "(a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. [¶] (b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. [¶] (c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. [¶] (d) An employer may not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment. [¶] (e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b). [¶] (f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section. [¶] (g) This section does not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950), the physician-patient privilege of Article 6 (commencing with Section 990) of Chapter 4 of Division 8 of the Evidence Code, or trade secret information."

public policy – premised in part on the public policy reflected in Labor Code section 1102.5 – does not lie against a public entity defendant.

C. Plaintiff's Fair Employment and Housing Act Claim Is Not Subject To The Government Claims Act

Defendant contends plaintiff's claims are barred because she failed to file a wrongful discharge claim under the Government Claims Act (Gov. Code, § 810 et seq.). We disagree. A Fair Employment and Housing Act cause of action is not subject to the claim filing requirements of the Government Claims Act. (*Garcia v. Los Angeles Unified School Dist.* (1985) 173 Cal.App.3d 701, 710-711; *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 868; *see Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1360.)

D. Sufficiency of the Evidence

Defendant contends there was no substantial evidence its reasons for discharging plaintiff were a pretext for illegal retaliation. We conclude that, viewing the evidence in the light most favorable to plaintiff (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, abrogated on another point as stated in *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926) – and although plaintiff established a prima facie case, and set forth some evidence

to reject defendant's explanation – her pretext evidence was insufficient as a matter of law to support a reasonable inference defendant acted with an illegal motive.

Government Code section 12940, subdivision (h), is the statutory basis for a Fair Employment and Housing Act retaliation cause of action. (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1161-1162; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1035.) Government Code section 12940, subdivision (h) states: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] . . . [¶] . . . For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

A Fair Employment and Housing Act retaliation claim is subject, at trial, to the three-stage burden-shifting test set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-805. (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1042; *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 356; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476-479.) First, the plaintiff must establish a prima facie case of retaliation: the

employee engaged in a protected activity; the employer subjected the employee to an adverse employment action; and there was a causal link between the protected activity and the adverse action. (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1042; *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1252; *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 614.) If the plaintiff establishes a prima facie case, a rebuttable presumption of retaliation arises. (*St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 506 *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) Here, plaintiff established a prima facie case of retaliation: she engaged in a protected activity by filing an administrative complaint with the Department of Fair Employment and Housing; she was subject to an adverse employment action in that she was fired; and there was a causal link between the protected activity and the adverse action – she was placed on paid administrative leave pending an investigation into her conduct less than eight months after her first Department of Fair Employment and Housing administrative complaint was settled.

Second, once the employee establishes a prima facie case, the burden shifts to the employer to rebut the presumption of retaliation. (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at pp. 355-356; *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 112.) The employer rebuts the presumption by producing evidence it took the adverse employment action for a legitimate, non-retaliatory reason. (*Yanowitz v. L'Oreal*

USA, Inc., supra, 36 Cal.4th at p. 1042; *Reeves v. Safeway Stores, Inc., supra,* 121 Cal.App.4th at pp. 355-356.) The employer's explanation "need not necessarily have been wise or correct" (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 358) nor "sound, fair, or correct, but only colorable enough that a rational jury could believe it to have been the employer's true motivation. [Citation.]" (*Reeves v. Safeway Stores, Inc., supra,* 121 Cal.App.4th at p. 112, fn. 12.) If the employer meets this burden, if it offers a facially sufficient lawful reason for the challenged action, the presumption of retaliation disappears. (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1042; *Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 356; *Reeves v. Safeway Stores, Inc., supra,* 121 Cal.App.4th at p. 112.)

Here, defendant produced evidence it terminated plaintiff's employment because she lacked professionalism, disrespected judicial officers, and engaged in conduct that negatively reflected on the city attorney's office. The incident that was the immediate trigger of defendant's investigation occurred on November 27, 2001, in Commissioner (now Judge) Joseph Biderman's courtroom. Plaintiff had noticed a motion to revoke a convicted child molester's probation. Commissioner Biderman called the case at 8:30 a.m., but plaintiff was not present. She was stuck in traffic. Plaintiff's secretary so notified the court. Commissioner Biderman called the case a second time at 9:15 a.m. Plaintiff still was not present. At 9:22 a.m., Commissioner Biderman placed the matter off

calendar. At 10:30 a.m., plaintiff telephoned Commissioner Biderman's court clerk, Gatanya Jones, and made wholly inappropriate comments. Among the improper comments was the statement that Commissioner Biderman would have to answer to "the creator" for what he had done.

At trial, plaintiff admitted as follows. On November 27, 2001, she failed to timely appear for a probation violation hearing in Commissioner Biderman's courtroom. Plaintiff telephoned Commissioner Biderman's courtroom clerk, Ms. Jones. Plaintiff learned that when she failed to appear, Commissioner Biderman had taken the matter off calendar. Plaintiff believed that as a result of Commissioner Biderman's action, the defendant's probation would be terminated. Ms. Jones read Commissioner Biderman's minute order to plaintiff. Thereupon, plaintiff told Ms. Jones that part of what Commissioner Biderman had written in the court file was a lie. Plaintiff accused Commissioner Biderman of having a "personal vendetta" against her. Plaintiff said she was so upset about what Commissioner Biderman had done that, "[M]aybe I would file a complaint against him." In the telephone conversation, plaintiff told Ms. Jones that Commissioner Biderman "would have to answer to the creator" for his actions.

Ms. Jones advised Commissioner Biderman about the telephone call. Ms. Jones told Commissioner Biderman plaintiff: "was very angry, agitated, [and] upset"; was yelling, arguing about why the case was taken off calendar; and demanded to know why

the matter was taken off calendar. Ms. Jones also told Commissioner Biderman that plaintiff said he "would be answering to God for what" had occurred. Commissioner Biderman understood plaintiff's remarks as a "veiled reference" to his homosexuality. Commissioner Biderman "felt sick about" plaintiff's remarks. Commissioner Biderman testified he: "felt very personally insulted"; "was very upset about it"; and "was in shock about the whole thing." Commissioner Biderman reported the incident to Judge Stephanie Sauter [sic]. Judge Sauter [sic] in turn reported the matter to plaintiff's supervisor, Maureen Siegel. Maureen Siegel reported the incident to Earl Thomas. Mr. Thomas reported what had occurred to Chief Deputy City Attorney Terree Bowers. This was sufficient evidence defendant had a legitimate, non-retaliatory reason for terminating plaintiff's employment as a deputy city attorney.

Third, once the defendant provides evidence of a non-retaliatory reason for its action, the plaintiff must show the employer's proffered reason was a pretext for retaliation or offer other evidence of retaliatory motive. (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 356; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.) The plaintiff must show by a preponderance of the evidence that the adverse employment action was in fact the result of an illegal motive – in this case retaliation – rather than other causes. (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 356; *Reeves v. Safeway Stores, Inc., supra,* 121 Cal.App.4th at p.

112.) The Supreme Court has held: "In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. [Citations.]" (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 356; *see California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1023.) Pretext may be shown by direct evidence, such as remarks by a decision-maker reflecting a retaliatory motive. Or pretext may be demonstrated by circumstantial evidence, such as the timing of the decision. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 816-817; *Flait v. North American Watch Corp., supra,* 3 Cal.App.4th at p. 479.) The plaintiff bears the ultimate burden of persuasion on the issue of actual retaliation. (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 356; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 990.)

Plaintiff presented evidence she was: a conscientious, determined, hardworking, honest, and courteous deputy city attorney who had never been disciplined, threatened with an adverse employment action, or given a notice to correct deficiencies; she was placed on paid administrative leave less than eight months after the parties settled her initial Department of Fair Employment and Housing administrative complaint; and defendant's ensuing investigation fell below industry standards. Moreover, plaintiff presented evidence that – following the settlement of her first Department of Fair Employment and

Housing administrative complaint and her appointment as "attorney in and supervisor over" the new Hate Crimes Unit – her superiors isolated her and undermined her authority. Members of the city attorney's office were not advised that the Hate Crimes Unit had been created or that plaintiff was supervising it. Plaintiff was described to others as the "deputy in charge" of the unit, rather than the unit supervisor. Plaintiff was told she was not supervising anyone and therefore should not be referred to as a supervisor. Plaintiff's business cards identified her as "deputy in charge." Plaintiff was advised that, because she was not supervising anyone, she did not need to attend supervisors' meetings. A supervisor failed to advise plaintiff of a meeting with the Los Angeles Police Department's task force on hate crimes. Plaintiff was excluded from a meeting with the city attorney and a representative of the Los Angeles County Commission on Human Relations. This was a meeting plaintiff had proposed. Plaintiff was not advised the city attorney's office was proposing new hate crime legislation nor was her input sought. In addition, a superior asked a law clerk to contact the district attorney's office to inquire about their hate crime prosecutions. This caused plaintiff professional embarrassment.

Notwithstanding plaintiff's showing, we conclude that in the face of strong, extensive, largely unrebutted evidence defendant had a legitimate, nonretaliatory reason for terminating her employment, her evidence was insufficient as a matter of law to

support a reasonable inference defendant acted with an illegal, retaliatory motive. Both the United States and the California Supreme Courts have recognized there may be instances in which the employee's pretext evidence is insufficient as a matter of law to support a reasonable inference the employer acted with an illegal motive. (*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 141-149; *Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at pp. 353-354, 362.)

Reeves involved an age discrimination claim under the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) (ADEA). In *Reeves,* the United States Supreme Court held that in some cases, even when the plaintiff establishes a prima facie case and introduces evidence of pretext, the defendant may be entitled to judgment as a matter of law: "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. [¶] This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory

reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. [Citation.] . . . [¶] Whether judgment as a matter of law is appropriate in any particular case will depend on a number of facts. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." (*Reeves v. Sanderson Plumbing Products, Inc., supra,* 530 U.S. at pp. 148-149.)

Federal appellate court decisions relying on the foregoing language in *Reeves* are in accord. (*Swackhammer v. Sprint/United Management Co.* (10th Cir. 2007) 493 F.3d 1160, 1168-1174 [plaintiff's evidence of pretext (disparate treatment) did not raise a triable issue as to the stated reasons for termination – improper relationships with vendors]; *Hossack v. Floor Covering Associates of Joliet, Inc.* (7th Cir. 2007) 492 F.3d 853, 858, 863 [judgment notwithstanding the verdict order setting aside $250,000 plaintiff's verdict affirmed where the employee's spouse's threatened to make a co-employee's life "miserable"]; *Turner v. Honeywell Federal Mfg. & Technologies, LLC* (8th Cir. 2003) 336 F.3d 716, 723-724 [employee failed to demonstrate that the stated justification was false or discriminatory]; *Peters v. Lincoln Elec. Co.* (6th Cir. 2002) 285 F.3d 456, 471-475 [employee's

evidence he had good rapport with subordinates and a sound management style did not show the stated reasons for alleged discrimination (lack of leadership and communication skills, inability to adequately interface with external auditors, and absence of international experience needed for employer's expanding worldwide needs) were pretextual]; *Zapata-Matos v. Reckitt & Colman, Inc.* (1st Cir. 2002) 277 F.3d 40, 47 [where the explanations for "termination [were] themselves consistent and not contradicted by either contemporaneous documents or statements made at termination or later," *Reeves* mandated entry of summary judgment]; *Gray v. Toshiba America Consumer Products, Inc.* (6th Cir. 2001) 263 F.3d 595, 600-601 ["Toshiba articulated a non-discriminatory reason for firing Gray, namely, that she committed an intentional, premeditated assault on a fellow employee after being warned by several superiors not to do so. Gray, however, has produced no evidence casting doubt on the credibility of this articulated reason"]; *Roge v. NYP Holdings, Inc.* (2nd Cir. 2001) 257 F.3d 164, 167-169 [employer's downsizing and supervisor's conclusion there were irregularities in the plaintiff's disability claims were sufficient to overcome pretext evidence]; *Cha v. Henderson* (8th Cir. 2001) 258 F.3d 802, 805-806 [supervisors' improper reliance on plaintiff's sexual harassment outside the workplace was a neutral nondiscriminatory reason sufficient to withstand a pretext claim]; *Dammen v. UniMed Medical Center* (8th Cir. 2001) 236 F.3d 978, 982 ["assuming [plaintiff] has presented a prima facie case of age discrimination, the

weakness of his prima facie case and the low probative value of his evidence that [defendant's] explanation is false convinces us that he has failed to present a submissible case of age discrimination"]; *Schnabel v. Abramson* (2d Cir. 2000) 232 F.3d 83, 87-88 [prima facie case of age discrimination overcome by showing of neutral grounds for termination: "plaintiff's asserted contempt for Legal Aid clients, difficulty following instruction, 'outright insubordination,' and 'inept[ ]' performance"]; *Chapman v. AI Transport* (11th Cir. 2000) 229 F.3d 1012, 1031 ["leaving several employers in a recent and short period of time, or job-skipping, is an [eminently] reasonable basis upon which to choose between job applicants"].)

Similarly, federal district courts have applied *Reeves* in the context of different forms of unlawful discrimination and pretext claim contexts. (*Allen v. City of Sturgis* (W.D.Mich. 2008) 559 F.Supp.2d 837, 849 ["Allen has not provided an evidentiary foundation for a finding that the City's stated reason for terminating him was a pretext (for FMLA-violative conduct) and that the City would not have terminated him if he had not taken FMLA leave"]; *Lightner v. City of Wilmington, North Carolina* (E.D.N.C. (2007) 498 F.Supp.2d 802, 816 ["In this instance, considering plaintiff's weak *prima facie* case and his testimony of record and arguments acknowledging the Department's motivation for acting, no reasonable jury could" find unlawful discrimination]; *Scuderi v. Monumental Life Ins. Co.* (E.D.Mich. 2004) 344 F.Supp.2d 584, 597 ["The particularized facts that were before

[defendant] at the time that [the supervisor] made the decision to terminate [p]laintiff clearly establish that the reason given for terminating [p]laintiff – i.e., alteration of Ms. Frenczli's JEPS test – has a basis in fact"]; *Webber v. International Paper Co.* (D.Me. 2004) 326 F.Supp.2d 160, 169-170 ["In this case, the evidence is conclusive that Mr. Webber was included in the reduction in force because of his lack of professional qualifications: there was no showing that Mr. Oettinger or any of the other decisionmakers involved harbored discriminatory animus, and no suggestion that the decision to eliminate two project engineer positions was influenced by impermissible discrimination." (Fn. omitted.)]; *Hunter v. St. Francis Hosp.* (E.D.N.Y. 2003) 281 F.Supp.2d 534, 547 [the fact that the plaintiff had received unwarranted bonuses and pay increases in the past was insufficient evidence of pretext]; *Wright-Khan v. People's Bank* (D.Conn. 2003) 274 F.Supp.2d 205, 215-216 ["Here, any issue of fact as to the accuracy of the Bank's prof[f]ered reason would be at least 'only a weak issue of fact,' and there is 'abundant and uncontroverted independent evidence that no discrimination ha[s] occurred,' given the complete lack of evidence that the Bank was motivated by Wright-Khan's disability when it took any action against her"]; *Morris v. Charter One Bank, F.S.B.* (N.D.N.Y. 2003) 275 F.Supp.2d 249, 259-260 [where the plaintiff's age claim rested almost exclusively on the fact a replacement was younger, the pretext evidence was weak and the employer was entitled to judgment]; *Newsom-Lang v. Warren Intern., Inc.* (S.D.N.Y. 2003) 249 F.Supp.2d 292, 301

[instances of unprofessional conduct were sufficient to overcome pretext evidence that termination was motivated by the plaintiff's age]; *Brunelle v. Cytec Plastics, Inc.* (D.Me. 2002) 225 F.Supp.2d 67, 81 ["the picture that emerges is one in which an employer has made a notably strong showing that the termination in question was animated by perceived misconduct, to which an employee has responded with a notably weak showing of pretext"]; *Eugene v. Rumsfeld* (S.D.Tex. 2001) 168 F.Supp.2d 655, 677-678 [reduction in force]; *Steiner v. Envirosource, Inc.* (N.D.Ohio 2001) 134 F.Supp.2d 910, 920 [same].)

The California Supreme Court adopted the foregoing reasoning in *Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at pages 361-362. In *Guz,* a summary judgment case, the California Supreme Court explained that the employer submitted "competent, admissible evidence" of a legitimate reason, unrelated to discrimination, for terminating the employee. (*Id.* at p. 357.) Our Supreme Court then held that, "[The employee] thus had the burden to *rebut* this facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred." (*Ibid.*) Earlier in the opinion, our Supreme Court held, "To survive summary judgment, [the employee] was thus obliged to point to evidence raising a triable issue – i.e., permitting an inference – that, notwithstanding [the employer's] showing, its ostensible reasons were a mask for prohibited age bias." (*Id.* at p. 353.) Our Supreme Court summarized its ultimate conclusion thusly: "In

the face of [the employer's] strong and unrebutted showing that it took its actions for nondiscriminatory reasons, the evidence of age favoritism on which [the employee] relies manifestly lacks sufficient probative force to allow a finding of intentional age discrimination." (*Id.* at pp. 353-354.) The California Supreme Court explained that the question is not whether the employer's "true reasons" for the adverse employment action were wise or correct; the ultimate issue is whether the employer acted with an illegal, discriminatory motive. (*Id.* at p. 358.) If the employer presents evidence of reasons "manifestly unrelated to intentional [discrimination]," the employee then bears the burden of producing evidence sufficient to support a rational inference that the decision to terminate employment was actually made on a prohibited basis. (*Id.* at pp. 360-361.)

In the present case, defendant presented strong, extensive, largely uncontradicted evidence plaintiff, a public prosecutor, had repeatedly conducted herself in a wholly unacceptable manner – which conduct led four members of the city attorney's office to agree that plaintiff's employment should be terminated: deputy city attorneys Zna Portlock Houston, who conducted the city's investigation, and Patricia Tubert, who conducted the *Skelly* hearing;[2] Chief Deputy City Attorney Terree Bowers; and City Attorney

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[2] Under *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 206, a civil service employee must be afforded certain procedural rights before he or she can be discharged.

Rocky Delgadillo. There was substantially uncontradicted evidence plaintiff had a long history of inappropriate conduct before judicial officers, for which she had been counseled, and which culminated in the incident involving then Commissioner, now Judge, Biderman. This history of unprofessional conduct, and of complaints about plaintiff's behavior, was documented in the notice of proposed termination and its attachments, and corroborated by testimony at trial, including that of judges, coworkers, and supervisors in the city attorney's office. Much of the evidence came from superior court judges before whom plaintiff had appeared and who had been interviewed during the city's investigation. These judges had no knowledge of plaintiff's initial Department of Fair Employment and Housing administrative complaint. Or even if they did, none of the judges had any motivation to retaliate against plaintiff for filing the Department of Fair Employment and Housing administrative complaint. Moreover, Mr. Delgadillo, the city attorney, cannot be expected to retain as a public prosecutor – a position of great power and even greater responsibility – an attorney who conducts herself or himself in a manner antithetical to that position.

The November 6, 2002 revised notice of proposed termination stated in part: "You are hereby notified that the Los Angeles City Attorney's Office proposes to terminate you from the position of Deputy City Attorney III because of your lack of professionalism in the courtroom, disrespect to judicial officers, improper

behavior in relations with fellow employees and other members of the bar, and engaging in conduct which seriously reflects on the professionalism of this Office. [¶] A review of your conduct in a courtroom on November 27, 2001, has been completed. During the course of the investigation related to your conduct on November 27, 2001, other serious issues were raised regarding your performance in court which were also reviewed." The revised notice charged plaintiff with 15 separate acts of misconduct. We summarize the extensive allegations: making inappropriate, hateful and unprofessional comments about Commissioner Biderman through his court staff; failing to appear for the hearing in the probation revocation matter, *People v. Newman;* misleading Commissioner Biderman and his staff as to the reason you did not appear; going to Judge Patricia Schnegg's courtroom every half-hour and repeatedly making demands; being disrespectful and unnecessarily argumentative with then Judge now Associate Justice Laurie Zelon; acting in a manner beyond zealous advocacy in the *Newman* matter; repeatedly antagonizing fellow deputies; being abusive and condescending toward them; claiming that only you and no one else can represent the People in cases assigned to you; failing to improve after having been counseled on numerous occasions as to lack of professionalism, hostility, confrontational attitude; inappropriately and unnecessarily subpoenaing a deputy public defender; being late to court on a regular basis and not calling or not appearing at all; being caustic and disrespectful to the court on several occasions, causing several judges

to complaint; inappropriately and without legal cause dismissing an African-American female as a juror; mishandling the *People v. Frierson* trial in numerous respects including prosecuting it as a hate crime when defendant was willing to plead to battery; demonstrating a severe lack of professional judgment and an inappropriate visceral approach to prosecuting cases; and demonstrating a lack of professionalism in the *Newman* case.

Mr. Bowers testified at trial that he became chief deputy to the city attorney in August 2001. Mr. Bowers was Mr. Delgadillo's "number two" in the office. As such, Mr. Bowers handled all of the day-to-day issues that arose in the various branches and sections of the city attorney's office. Mr. Delgadillo wanted to "clean up" the office and to improve its reputation. According to Mr. Bowers, a prosecutor's reputation is crucial; a person with a reputation for dishonesty or untrustworthiness cannot be an effective prosecutor. Toward the end of September 2001, Mr. Bowers met with plaintiff as supervising attorney in the hate crimes unit. He had met with supervisors in other units as well. Mr. Bowers had learned plaintiff was making representations on Mr. Delgadillo's behalf without authorization. Further, Mr. Bowers was concerned about her interaction with other law enforcement agencies. In addition, two of her supervisors – Mr. Thomas and Ms. Siegel – had expressed concern about plaintiff. Mr. Bowers wanted to get "some understanding" of exactly what plaintiff was doing, the nature of her caseload, and the types of cases she

was handling. At the conclusion of the meeting, Mr. Bowers had serious doubts about plaintiff's judgment. He testified: "I had serious doubts about her exercise of judgment, I had concerns about the use of the limited resources since she was a unit of one, and I had some concerns about her approach. [¶] It seemed to me that she was too viscerally, emotionally involved, and whenever you have a prosecutor like that, there is a danger of a win-at-all-costs type of mentality." Mr. Bowers discussed with plaintiff her exercise of judgment, strategy, and use of resources.

Mr. Bowers prepared a memorandum after the meeting to record his concerns. The September 28, 2001 memorandum states: "My initial meeting with Ms. Magnandonovan left me with a number of concerns which I feel compelled to document. [¶] 1. By the time Ms. Magnandonovan and I met, she had already attended City and County Hate Crimes Task Force meetings. In light of the events of September 11, 2001, I would have expected Ms. Magnandonovan to have had some contact with the front office before attending these meetings. She apparently made representation[s] on behalf of City Attorney Delgadillo without having ever contacted the front office for guidance. [¶] 2. Ms. Magnandonovan later called an 'emergency meeting' of representatives from other agencies, which was not cleared with our front office. Having called the emergency meeting, she left before it was completed. [¶] 3. During our meeting, she complained about a judge mistreating her. When I finally got her to describe the case, it raised serious

doubts as to whether the case was ever a hate crime case. (A black male got mad at a white female for honking her horn. He called her a 'white bitch' and punched her, resulting in serious injuries.) The [district attorney's office] did not view it as a hate crime. Ms. Magnandonovan filed it as a misdemeanor hate crime, when it probably should have been filed as a felony battery. [¶] 4. Another case Ms. Magnandonovan described also involved a white female victim. This raised concerns about our case selection and I have accordingly asked for her inventory of cases. [¶] 5. During this meeting, Ms. Magnandonovan, at times, became very emotional. Her overzealousness and overly emotional approach may interfere with her responsibility to analyze theses [sic] cases in an objective manner. Further inquiry required."

Sometime after the meeting with plaintiff discussed in the foregoing September 28, 2001 memorandum, Mr. Bowers learned about the events surrounding the hearing before Commissioner Biderman. Mr. Bowers was told that: plaintiff had failed to appear in Commissioner Biderman's courtroom; there was the possibility that she had misrepresented why she was not present; and she had insinuated that Commissioner Biderman had ruled in a particular way because of his sexual orientation. Mr. Bowers was "somewhat shocked" and extremely concerned. Mr. Bowers asked Mr. Thomas to contact Commissioner Biderman and find out what had happened and to apologize. In addition, Mr. Bowers asked Deputy City Attorney Zna Portlock Houston, who was

head of the Labor Relations Branch, to investigate the November 27, 2001 events.

Ms. Houston interviewed Commissioner Biderman on January 10, 2002. She prepared a witness interview statement. Commissioner Biderman said that on November 27, 2001, at 8:30 a.m., he took the bench and called *People v. Newman,* a case involving a convicted child molester. Plaintiff, the deputy city attorney on the case, was not present. Commissioner Biderman took steps to ensure plaintiff's presence, but was unsuccessful. Later that morning, plaintiff called Commissioner Biderman's clerk, Ms. Jones. Around 10:30 a.m., Ms. Jones told Commissioner Biderman about the telephone conversation with plaintiff. Commissioner Biderman told Ms. Houston plaintiff had made inappropriate comments to the court through Ms. Jones. Commissioner Biderman was personally offended by plaintiff's remarks, which he described as unprofessional, disrespectful, and offensive. Ms. Houston reported: "[Commissioner Biderman] felt that since he believes [plaintiff] is aware that he is a gay bench officer that she was implying that gays have a soft spot for child molesters and therefore [he] would be lenient on the defendant. Commissioner Biderman further stated that it is ironic that [plaintiff] is assigned to handle hate crimes as he believes her remarks constituted hate speech." Commissioner Biderman shared his concerns with Supervising Judge Sautner and Mr. Thomas, Senior Assistant City Attorney, Criminal Branch Operations. Commissioner Biderman related

that prior to November 27, 2001, he had been inclined to recuse himself from plaintiff's cases because she appeared to accuse him of being biased. Commissioner Biderman told Ms. Houston he believed plaintiff had behaved inappropriately while appearing before other judicial officers – Judges Patricia Schnegg, Carol H. Rehm, and James R. Brandlin. Commissioner Biderman believed those incidents should be investigated.

The transcript of the November 27, 2001 hearing showed Commissioner Biderman called the *Newman* case, but plaintiff was not present. He put the matter on "second call" in order to await plaintiff's arrival. Commissioner Biderman called the case a second time, after 9:15 a.m. A deputy city attorney advised the court he had not heard from plaintiff but, "[W]e just passed word to her in Division 40." Ms. Jones telephoned Division 40 and advised Commissioner Biderman, "I've been told that no one [in Division 40] has seen her today." At 9:22 a.m. Commissioner Biderman ruled as follows: "The court has made inquiry regarding Ms. [Magnandonovan's] whereabouts. The court staff has not received a call back. The court, additionally, called Division 40. Division 40 did not see Ms. [Magnandonovan] in the courtroom, although, apparently she had a case on calendar there today. The court has further requested the city attorney to attempt to contact Ms. [Magnandonovan], and that has not yielded any results, no calls from her. This case was calendared at her request for today's date for probation violation hearing. There

being no appearance by the prosecution, the probation violation hearing is off calendar. Probation reinstated and bail ordered exonerated."

Commissioner Biderman's court clerk, Ms. Jones, provided a February 13, 2002 declaration to Ms. Houston. Ms. Jones declared: "On November 27, 2001, Commissioner Biderman took the bench promptly at 8:30 a.m. and began calling the calendar. At the time in which he called *People v. David Newman,* . . . Deputy City Attorney Ms. Lynn Magnandonovan was not present. Commissioner Biderman asked me to attempt to locate [plaintiff]. I called [plaintiff's] office and was told she would be in Division 40 and thereafter would arrive to Commissioner Biderman's courtroom in Division 141. I later called [plaintiff's] office again and was told she was stuck in traffic. [¶] At approximately 10:30 a.m. I received a telephone call from [plaintiff] regarding the Newman case. [Plaintiff] was very upset at the fact that the Court in her absence took the probation violation hearing off calendar. She asked me exactly what time Commissioner Biderman took the bench and I told her at 8:30 a.m. [Plaintiff] told me she had been in Division 40, and I told her that I called Division 40 and she was not there. [Plaintiff] then stated maybe she was stuck in traffic. She asked what time did the Court hear her case and I told her that I was not sure. She said that this was unconstitutional and that she had been in court many times and had to wait on defense counsel for hours and hours at a time. I responded, not in this court. She said that she

was being prejudiced against and stated 'you and I both know why' and that Commissioner Biderman would have to answer to God for his actions. She also asked me how would I feel if I had a son and someone like Mr. Newman preyed on my son. She then stated 'you would want the City Attorney's Office to do everything we could to keep him away from you son.' [Plaintiff] said she was going to speak to her supervisor about the matter because the situation was unconscionable and that Commissioner Biderman would have to answer to his maker. [Plaintiff's] tone was argumentative and somewhat abrasive in my opinion. After stating to her that I was not going to argue with her regarding this matter and that I could not say why Commissioner Biderman ruled the way he did because I didn't know and that she should calm down, she then apologized to me for being upset and said that she realizes that it wasn't my fault and that she was sure that I had relayed all messages to Commissioner Biderman regarding her being late."

Ms. Houston interviewed Judge Schnegg on April 10, 2002. Judge Schnegg had been assigned to Division 40 in the Clara Shortridge Foltz Criminal Justice Center in 2001, where plaintiff frequently appeared. Judge Schnegg described plaintiff's "approach" as "often caustic and disrespectful" to the court. Prior to July 2001, Judge Schnegg had reported "her concerns about [plaintiff's] lack of judgment" to the city attorney's office. Judge Schnegg stated plaintiff was late to court on several occasions and did not telephone. Judge Schnegg described a particular case as an

example of plaintiff's "failure to use adequate judgment": "The case of *The People v. Timothy Frierson* . . . involved an African-American male defendant who was charged with a hate crime for attempting to hit two Caucasian women in a parking lot. The defendant had admitted to a battery but insisted that it was not a hate crime. The case had been continued numerous times. The case passed through several public defenders and was finally at 10 of 10. The defense filed a 170.6 and it was unlikely that a court would become available. While waiting for an available courtroom, [plaintiff] came to Judge Schnegg's courtroom every half-hour demanding a courtroom. At one point, Judge Schnegg stated that [plaintiff] demanded that Judge Schnegg call Judge Bascue, the Supervising Judge in order to get an open courtroom. Judge Schnegg further stated that [plaintiff] claimed to have information from the highest authority in the City Attorney's Office that the Presiding Judge must be called. Moreover, [plaintiff] claimed that judicial authority dictated that Judge Schnegg was obligated to call the Presiding Judge. Judge Schnegg queried [plaintiff] to determine if she was really implying that the City Attorney, Rocky Delgadillo[,] had actually required that [plaintiff] make such a demand."

On May 17, 2002, Ms. Houston interviewed then Superior Court Judge (now Court of Appeal Associate Justice) Zelon. Judge Zelon stated plaintiff had appeared in her courtroom in 2001 on a discovery motion. Judge Zelon said, "[Plaintiff] was very difficult and disrespectful to the court in that she

insinuated that Judge Zelon either did not know or lacked understanding of the law." Plaintiff told Judge Zelon, "[S]he represented six million citizens of Los Angeles, and that Judge Zelon should explain to the people why it should take so long to decide the [discovery] matter." Judge Zelon said plaintiff took extreme positions regarding discovery, which were contrary to the city's attorney's "manner of handling discovery" disputes. Judge Zelon believed plaintiff was not being properly supervised. Judge Zelon stated, "[S]he would be concerned if the City Attorney's Office permitted [plaintiff] to make court appearances and to handle matters without close supervision to preserve the integrity of the proceedings."

In connection with the hearing before then Judge Zelon, plaintiff had subpoenaed a deputy public defender. On July 31, 2001, Deputy Public Defender Jerry A. Weil formally protested this treatment. Plaintiff was subsequently counseled by her superiors as to the inappropriateness of her actions, which violated office policy.

Ms. Houston interviewed Judge Brandlin on May 17, 2002. Commissioner Biderman had asked Judge Brandlin to transfer the *Newman* matter to another judge. Commissioner Biderman said he was uncomfortable presiding over the matter because plaintiff had implied he acted with an improper bias in the probation revocation hearing. Judge Brandlin handled the *Newman* matter himself. Judge Brandlin told Ms. Houston that in his opinion plaintiff acted in

a manner beyond that expected of a zealous advocate. Ms. Houston reported: "[Judge Brandlin] felt [plaintiff] was personally embroiled in the matter and therefore lost objectivity. According to Judge Brandlin, [plaintiff], made strident claims, utilized an unprofessional tone of voice, and frequently cut off opposing counsel. She appeared to be obsessed with the case. In general, it is Judge Brandlin's opinion that [plaintiff's] overall conduct was very unprofessional." Judge Brandlin felt strongly that plaintiff "lack[ed] civility" and was unprofessional.[3]

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[3] Judge Brandlin's witness interview statement further related as follows: "Judge Brandlin stated that he was concerned that [plaintiff] used improper motives by having the victim's mother and, the investigator on the case present in Court for the Motion. He was left with the impression that she was attempting to stack the audience section of the court room. It was his distinct impression that [plaintiff] was trying to unduly influence a judicial officer. Moreover, [plaintiff] attempted to introduce on the record all the witnesses in the audience associated with the case. Judge Brandlin stated that he suspected that [plaintiff] encouraged the witnesses to be present, even though a hearing involving witnesses had not been scheduled. Interestingly, the investigator on the case was Kevin Berman who was Judge Brandlin's wife's employer ten years ago. In addition, Kevin Berman's brother, Peter Berman was Judge Brandlin's former supervisor ten years ago. While, Judge Brandlin states that he cannot prove that [plaintiff] was aware of these connections, he nevertheless felt that [plaintiff] was very subtly attempting to curry favor. The cumulative nature of [plaintiff's] actions relative to the witnesses left Judge Brandlin feeling that [plaintiff's] actions were intentionally taken to make an impact on him. [¶] . . . Judge Brandlin stated that although he would not recuse himself were [plaintiff] to make future appearances in front of him, he certainly would not allow her the same

(Continued on following page)

The transcript of the September 24, 2001 hearing before Judge Brandlin was attachment No. 10 to the revised notice of proposed termination. Plaintiff argued a stipulation entered into by another deputy city attorney should be set aside. Plaintiff reasoned she was the prosecutor on the case and she was the only person who could represent the city in the matter. Plaintiff asserted the city attorney's office was not properly represented and had no meaningful opportunity to be heard because she, personally, was not present at the earlier hearing. At the earlier hearing, another deputy city attorney, who was unfamiliar with the case, had handled the matter. Plaintiff argued in part: "[Deputy City Attorney] Milne, since he does not understand how this case affected the minor children, since Mr. Milne does not understand how the parents feel, because Mr. Milne was not

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leniency. . . . [¶] . . . He did not consider sanctioning [plaintiff] for her actions in his court room, however, he believes that sanctions may have been appropriate in that [plaintiff] claimed new facts in her moving papers dated October 16, 2001 filed after Judge Brandlin denied her motion heard on September 24, 2001. It is his impression that the pleadings stretched credibility and there was an appearance of vindictive prosecution. In addition, he felt her motivation was questionable in requiring bail to be posted by the defendant. Her declaration in support of the denial of bail was unclear as to time, or as to what terms of the probation had been violated. Judge Brandlin was particularly troubled by [plaintiff's] failure to produce discovery and to appear on her own motion as he believes that the City Attorney has a duty to ensure that the governmental power to prosecute violations of probation and deprive persons of their liberty is not abused by officers of the Court."

available during the sentencing proceeding to hear the parents come forward and talk about how distressed they were, if Mr. Milne had had the benefit of that, as I have, maybe Mr. Milne would not have acted the way he did. So the real issue, I think, . . . is what kind of hearing are we talking about? What is an opportunity to be heard? That is a due process concern. And I'm sure that this court is very mindful of the due process rights of the defendant. The [P]eople happen to be very aware and support the due process of the defendant. [¶] But the due process of the defendant is never to minimize the due process of the [P]eople. I stand in front of you representing four million people. And those four million people expect their due process. And I do not think that that's what happened in this case. . . . [¶] . . . I am the prosecuting attorney. Mr. Milne was not the prosecuting attorney. He was not. I was. That was me. You're looking at me. I am the prosecuting attorney."

Ms. Houston also interviewed Superior Court Judge Yvette Palazuelos. The interview took place on May 20, 2002. Judge Palazuelos had granted a mistrial on her own motion after plaintiff exercised a peremptory challenge to the sole African-American juror in the entire panel. Judge Palazuelos described plaintiff's general demeanor and certain remarks as "inappropriate." Judge Palazuelos described plaintiff's advocacy as sometimes being "overzealous." Judge Palazuelos' staff did not want to assist plaintiff. This was because plaintiff was "irritating" and uncooperative. Judge Palazuelos's clerk, Delia

Rodriguez, told Ms. Houston that plaintiff "had a tendency to continue arguing" after the court had ruled and "was disrespectful" during proceedings. Judge Palazuelos's court reporter, Veronika Green, told Ms. Houston that plaintiff was "very condescending" toward jurors, "very argumentative," would "snicker" at Judge Palazuelos's rulings, and "exhibited a very controlled disrespect" of the court.

Ms. Houston presented the results of her investigation to Mr. Bowers. Based on his review of those materials and the totality of the information he had received, including the caseload review he had conducted with plaintiff, Mr. Bowers concluded she should be placed on administrative leave pending further investigation. He testified at trial, "I had serious doubts about whether she could be continued as an attorney in the office." Mr. Bowers subsequently recommended to Mr. Delgadillo that plaintiff's employment be terminated. Mr. Delgadillo approved that recommendation. Mr. Bowers testified at trial: "The reason I made the decision that she needed to be discharged or terminated had several aspects. I thought that there were some fundamental issues with [plaintiff] that could not be corrected with training, that she was not a new, inexperienced attorney. She had been in the office for a while; in fact, she was in a supervisory position. [¶] I personally felt that based on the information I had received from the judges and experienced myself, I thought that she was untrustworthy, I did not think she was honest, and I thought she was damaging the

credibility of the office by her continued practice in superior court. I thought that so long as she continued to appear in the courts . . . as a member of the city attorney's office, it undermined our credibility as an office and . . . damaged our reputation significantly. [¶] I also learned that because of the way she treated her colleagues and occasional temper tantrums and outbursts of profanity, that essentially she poisoned the work environment and made it more difficult for other deputies to perform their responsibilities in what is always a very stressful situation when you're getting ready for trials, and you don't' need to put up with that sort of abhorrent behavior. [¶] And then, again, her judgment in my mind was suspect in the way she was handling hate crime cases. When at times they could be better prosecuted as, let's say, an assault and battery by the [district attorney's] office, she would insist on bringing it in as a hate crime; and . . . based on my experience with these types of crimes where you had subjective intent, I just thought that was not appropriate and it was . . . very poor judgment on her part. [¶] So it was . . . a comprehensive evaluation of many, many problems, none of which could be resolved by just a transfer or training. I thought they were fundamental issues that just could not be resolved."

Mr. Bowers appointed Patricia Tubert, head of the Municipal Counsel Branch, to conduct a *Skelly* hearing. Ms. Tubert held a *Skelly* hearing on January 28, 2003. Plaintiff did not appear, but was represented by two union representatives and a private attorney.

Plaintiff's representatives did not present any information to dispute or contradict the charges in the revised notice of proposed termination. Ms. Tubert subsequently recommended that plaintiff be discharged. Ms. Tubert found: "[T]he Skelly package materials provided to me in June and August of 2002, include sufficient information to support the termination of Lynn Magnandonovan for disrespect to judicial officers, demonstrated by (1) her inappropriate, hostile and contemptuous comments and arguments to the court and court personnel, failure to appeal in a timely manner, lying to the court about her whereabouts and submitting an intentionally misleading pleading and (2) lack of professionalism and professional judgment as demonstrated by her inappropriate, hostile and contemptuous comments and arguments to the court and court personnel, failure to appear in court in a timely manner, lying to the court about her whereabout[s] and submitting an intentionally misleading pleading, as well as, inappropriate demand that a bench officer be required to testify at a hearing, incorrect statements that only she can represent the People of the State of California in matters in which she has handled any portion of the prosecution, inadequate preparation for the *Frierson* case, including lack of judgment in filing the case, not accepting a plea and trying the case, inappropriate attempt to keep relevant discovery from defense counsel, inappropriate arguments with defense counsel in the *Newman* and *Frierson* cases, inappropriate handling of an unnecessary subpoena of a public defender, demeaning the legal performance of another Deputy

City Attorney in arguments to the court, unresponsiveness to counseling by supervisors and inability to work with other members of the office; all of which seriously reflect badly on the professionalism of this office." (Italics substituted for underscoring.) Mr. Bowers and Mr. Delgadillo accepted Ms. Tubert's recommendation.

At trial, Judge Biderman testified he had been shocked by plaintiff's comments in the wake of the probation violation hearing. He understood her comments to refer to the nature of the charges – molestation of a child – and to be a veiled reference to his sexual orientation and personally insulting. Judge Brandlin testified that during the hearing before him, plaintiff had acted beyond zealous advocacy, and had been abrasive and unprofessional in her demeanor and tone of voice, including interrupting opposing counsel. In addition, Judge Brandlin concluded a reasonable person in plaintiff's position would have not believed in the merits of the legal position she took.

By the time of trial, Judge Zelon had been appointed to the Court of Appeal. Associate Justice Zelon described plaintiff's conduct during superior court proceedings. Associate Justice Zelon testified plaintiff: was at times disrespectful; crossed the line beyond zealous advocacy; and spoke in a "sharp" and "sarcastic" tone. Justice Zelon found plaintiff's tone and body language to be inconsistent with that expected of a lawyer in a courtroom. As noted above, plaintiff had appeared before then Judge Zelon.

Justice Zelon described one incident: "As best I can recall it now, she referred to the fact that she represented the six million citizens of the City of Los Angeles and that I should explain to them why I was delaying the trial in this case." Justice Zelon testified, "I believe that remarks of that nature in open court on the record show a profound disrespect for the role of the court in a criminal prosecution and the rights of the parties."

Judge Palazuelos testified concerning the case in which she discharged a jury based on the discriminatory use of a peremptory challenge on her own motion. Judge Palazuelos described plaintiff's demeanor and remarks as inappropriate. Judge Palazuelos testified, "[Plaintiff] was rude at times, discourteous, argumentative after I had made a ruling, facial gestures, eye rolling, huffing and puffing kind of, speaking loudly to me almost to the point of yelling at me at sidebar." When asked to describe plaintiff's tone of voice, Judge Palazuelos testified, "Aggressively, sarcasm. Communicating – she says, 'I've always shown you the proper respect that the robe deserves,' but the way she was saying it communicated the exact opposite of what she meant."

A supervisor with the city attorney's office, Alan Dahle, testified he once walked into a courtroom and found plaintiff screaming at a cowering woman. Further, contempt proceedings had been brought and sanctions imposed when plaintiff disobeyed an order to return evidence to a defendant. Police officers were reluctant to deal with plaintiff because she was

abrasive. Court reporters complained about plaintiff's language in the courtroom. Mr. Dahle had seen plaintiff be rude and disrespectful to judicial officers. Mr. Dahle testified, "[Plaintiff would] roll her eyes, turn her back, talk to someone else when the judge was talking to her. . . ." Mr. Dahle attempted to counsel plaintiff about these problems, but her behavior did not change. There were judicial officers who did not want plaintiff in their courtrooms.

Another supervisor in the city attorney's office, Lara Bloomquist, testified plaintiff had a confrontational, disrespectful, and unprofessional attitude toward judicial officers. Plaintiff would roll her eyes, throw her head back, and otherwise make it obvious she found what the court was saying to be stupid. A city attorney's office legal assistant and interpreter, Patricia de Luna, once saw plaintiff "cuss[] out" a teenage witness. Ms. de Luna testified plaintiff was very upset and really agitated. In fact, plaintiff was stomping her feet. According to Ms. de Luna, plaintiff said to the witness: "'How can you fucking forget what we just talked about? We were right in the middle of the fucking trial and you're fucking everything up.'" Deputy City Attorney Bernie Brown had supervised plaintiff from 1993 to 1996. He testified plaintiff was the most difficult attorney he had ever supervised. He had received complaints about plaintiff from judges and court staff. There were several courtrooms where plaintiff could not be assigned. Plaintiff was antagonistic, rude, used profanity, and had an unprofessional attitude. Mr. Brown considered

taking formal disciplinary action against plaintiff, but instead she was transferred into the special operations division.

Charles Goldenberg testified he was asked to take plaintiff into his unit because she was having problems elsewhere. Plaintiff's supervisor at the time of her termination was Mr. Thomas. Mr. Thomas testified he had received complaints about plaintiff from Superior Court Judges Patti Jo McKay and Veronica Simmons McBeth. Judge McKay told Mr. Thomas other jurists also did not want plaintiff in their courtrooms.

We conclude plaintiff's evidence her superiors undermined her position as supervisor over the Hate Crimes Unit was insufficient as a matter of law to support a finding defendant's proffered reasons for discharging her were a pretext for retaliation. Defendant offered plausible, largely uncontradicted evidence plaintiff had behaved in a wholly unacceptable manner before superior court judges in her capacity as a deputy city attorney. Standing alone, the uncontradicted evidence of the bullying and hostile language directed at Commissioner Biderman, through his deputy clerk, Ms. Jones, was a legitimate nondiscriminatory reason to discharge plaintiff, a public prosecutor. Plaintiff's evidence raised, at best, a weak suspicion she was the subject of retaliation because she filed a Department of Fair Employment and Housing administrative complaint. Defendant is therefore entitled to a judgment in its favor.

IV. DISPOSITION

The judgment, including the attorney fee award, is reversed. Judgment is to be entered in defendant's favor. Defendant, the City of Los Angeles, is to recover its costs on appeal from plaintiff, Lynn Magnandonovan. Plaintiff's appeal from the attorney fee award is dismissed as moot.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

I concur:

KRIEGLER, J.

Mosk, J., Dissenting

I dissent.

I would affirm. I agree that the City has forfeited or is otherwise precluded from pursuing on appeal its arguments concerning exhaustion of remedies and compliance with the claims presentation requirement by not litigating those issues in the trial court prior to judgment. I also agree that if there is sufficient evidence to support the retaliation in violation of the Fair Employment and Housing Act (FEHA, Gov. Code, § 12900, et seq.) claim, the jury's verdict must stand. It is arguable that there was a forfeiture of the defense of immunity set forth in *Miklosy v. Regents of the University of California* (2008) 44 Cal.4th 876,

898-899, because, other than a boilerplate allegation in the answer, the defense was only raised in a footnote in a new trial motion. Even if the defense was adequately raised so as, under *Miklosy,* to bar plaintiff's two common law wrongful termination causes of action, the judgment must nevertheless be affirmed because there is substantial evidence in the record to support her statutory claim of retaliation under FEHA. (*See Clement v. State Reclamation Board* (1950) 35 Cal.2d 628, 643.) I believe there is such sufficient evidence.

A. Standard of Review

The City's challenge to the sufficiency of the evidence in support of the verdict is reviewed under a substantial evidence standard. (*McRae v. Dept. of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 389 ["a jury's verdict stands only if it is supported by substantial evidence"].) "Substantial evidence is evidence that a rational trier of fact could find to be reasonable, credible, and of solid value. We view the evidence in the light most favorable to the verdict and accept as true all evidence tending to support the verdict, including all facts that reasonably can be deduced from the evidence. We must affirm the award of damages based on the verdict if an examination of the entire record viewed in this light discloses substantial evidence to support the verdict. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 [45 P.2d 183]; *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 [29

Cal.Rptr. 2d 191].)" (*Fassberg Construction Co. v. Housing Authority of the City of Los Angeles* (2007) 152 Cal.App.4th 720, 746.)

B. Evidence of Pretext and Retaliation

Plaintiff's second cause of action under FEHA is premised on retaliation for engaging in a protected activity – i.e., complaining about the City's failure to comply with the settlement agreement that settled, inter alia, her sex discrimination claim. (Cal. Gov. Code, § 12940, subd. (h.); Cal. Code Regs., tit. 2, § 7287.8, subd. (a); *see Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1050-1051.) The City does not raise any issue of whether plaintiff's claim is proper under FEHA or whether her complaint qualifies as protected activity. The City only contends that there was little, if any, competent evidence that the City's stated reasons for terminating plaintiff were pretextual or that the decision to terminate plaintiff was in any way related to her prior complaints about discrimination and retaliation. Focusing on the testimony of its decision-makers, such as Patricia Tubert, Terree Bowers, and City Attorney Rockard Delgadillo, the City argues there is nothing in the record to suggest that those decision-makers were motivated, in whole or in part, by plaintiff's complaints of discrimination and retaliation, or her settlement agreement with the City. As the City views the evidence, the decision-makers were motivated *solely* by plaintiff's acts of misconduct as specified in the proposed notices of termination.

Viewed in a light most favorable to the judgment, as it must be, the evidence was sufficient to support a rational inference that the City's stated reasons for plaintiff's discharge were pretextual and that she was discharged in retaliation for one or more of her prior complaints of discrimination and retaliation.

An employer's unlawful motive is most often established through circumstantial evidence. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 ["direct evidence of intentional discrimination is rare, and . . . such claims must usually be proven circumstantially"].) The record shows that plaintiff had not been disciplined, nor had she received any formal notices to correct deficient performance prior to being placed on administrative leave following the incident with Commissioner Biderman's clerk. That evidence, when coupled with plaintiff's evidence that the City's conduct (treatment of plaintiff while she was in the Hate Crimes Unit) in purported violation of the settlement agreement (resolving a prior FEHA complaint) began almost immediately after plaintiff executed that settlement agreement, constitutes circumstantial evidence of both pretext and retaliatory motive. (*See, e.g., Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 140 [evidence supporting finding of pretext included that plaintiff had never been reprimanded or received a negative performance review]; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69 [retaliatory motive is proved by showing plaintiff engaged in a protected activity, his employer was aware of that activity, and

the adverse action followed within a relatively short time thereafter].)

There was also testimony that plaintiff was a dedicated, hard-working prosecutor from a number of witnesses. That evidence augmented plaintiff's testimony concerning her satisfactory job performance and served to call into question the City's job actions against plaintiff following the incident with Commissioner Biderman's clerk. Moreover, the evidence showing that plaintiff, unlike other employees, was not progressively disciplined for the incident with Commissioner Biderman's clerk added further support to the inference that the City's stated reasons for pursuing plaintiff's immediate termination were pretextual.

In addition, plaintiff's expert testified that Ina Houston's (of the City Attorney's office) investigation was not neutral and was deficient in several material respects, including Houston's failure to interview plaintiff to obtain her side of the story. That evidence supports a reasonable inference that the investigation was not initiated as a result of the incident with Commissioner Biderman's clerk, but rather by a desire to contrive reasons for discharging plaintiff. Similarly, plaintiff's union representative testified that the original proposed notice of termination was insufficient, as was the documentary information that was provided to plaintiff in the "*Skelly* package." That evidence allowed the jury reasonably to infer that the *Skelly* process was unfair, biased, and designed as a

procedure by which the City could justify plaintiff's termination.

Notwithstanding the foregoing circumstantial evidence of pretext and retaliatory motive, the City emphasizes the other evidence showing specific instances of misconduct by plaintiff, including the testimony of the present and former superior court judges. Such evidence suggested that plaintiff engaged in inappropriate conduct in the courtroom. According to the City, that evidence demonstrates that the City's job actions against plaintiff were triggered by the incident with Commissioner Biderman's clerk and the other documented incidents of misconduct, and were wholly unrelated to plaintiff's prior complaints or the settlement agreement. But plaintiff countered much of that evidence with plausible explanations. An example is her testimony that she did not intend her comment to Commissioner Biderman's clerk as a reference to his homosexuality and that she was not even aware that the Commissioner was homosexual.

Although reasonable minds could have differed concerning the nature and extent of plaintiff's alleged misconduct, there was sufficient evidence in the record to allow the jury to infer that the misconduct was not as severe or outrageous as the City portrayed it. For example, the transcript of the *Wheeler* hearing in the hate crime matter was sufficient to support an inference that plaintiff reasonably believed the juror in question had been "nodding off," notwithstanding Judge Yvette Palazuelos's conclusion to the contrary.

Thus, the jury could reasonably have inferred that the City's reliance on that incident as a justification for its job action against plaintiff was pretextual. In light of the standard governing our substantial evidence review, this court cannot reweigh the evidence. This being so, there appears to be substantial evidence in the record to support the jury's finding that at least one of plaintiff's prior complaints of discrimination or retaliation was a motivating factor in her discharge.

The conduct of plaintiff's supervisors can be imputed to the ultimate decision-makers. (*See Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 113.) Therefore, even assuming that Tubert and Bowers had no retaliatory motive in discharging plaintiff, the evidence of their reliance on the information and investigations conducted by plaintiff's supervisors was sufficient to impute the retaliatory motives of those supervisors to the City's decision-makers.

For this reason, I conclude that the jury in this case did not render an irrational verdict. Determining that there is sufficient evidence to support the jury verdict does not suggest that I believe or disbelieve any witness or party or that I condone any of the conduct attributed to any party.

C. Conclusion

I would affirm the judgment. There is no need for me to discuss the attorney fees issue, although my

inclination would be to conclude that the trial court did not abuse its discretion in that regard.

MOSK, J.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

LYNN MAGNANDONOVAN, Plaintiff and Respondent, v. THE CITY OF LOS ANGELES, Defendant and Appellant.	B192892 (Los Angeles County Super. Ct. No. BC286908) ORDERS DENYING REHEARING PETITION AND RECUSAL REQUEST (Filed Nov. 14, 2008)

There is no merit to the title 42 United States Code section 1983 (section 1983) contentions raised in the rehearing petition because: no federal civil rights cause of action was pleaded nor was the case tried on such a theory thereby forfeiting the issue (see *City of Hawaiian Gardens v. City of Long Beach* (1998) 61 Cal.App.4th 1100, 1113-1114; *Board of Administration v. Wilson* (1997) 57 Cal.App.4th 967, 972); the third cause of action alleged wrongful termination (retaliation) in violation of public policy as embodied in various constitutional and statutory provisions including section 1983; as explained in the opinion, there is no liability on the part of a public entity under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 176-178 and its progeny (*Miklosy v.*

Regents of University of California (2008) 44 Cal.4th 876, 898-901); without objection the jurors were instructed the fourth cause of action, the only other claim mentioning section 1983, was no longer before them; and in the absence of evidence that defendant acted pursuant to an official policy, there is no section 1983 liability as respondeat superior principles are inapplicable. (*Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 690-691; *Manta Management Corp. v. City of San Bernardino* (2008) 43 Cal.4th 400, 403, 406; *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 349.)

The recusal motion is denied. The rehearing petition is denied.

/s/ Turner
TURNER, P.J.

/s/ Kreigler
KREIGLER, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

LYNN MAGNANDONOVAN, an individual, v. CITY OF LOS ANGELES, a municipal corporation, et al., Defendants.	CASE NUMBER BC286908 L.A. County Bench Recusal **Transferred to OC: 8/26/03** ***** (Orange County Rules apply) ***** **HON. W. MICHAEL HAYES, ASSIGNED OCSC DEPT. C24** **JUDGMENT ON JURY VERDICT** (Filed May 2, 2006)

This action came on regularly for trial on February 6, 2006, in Department C24 of the superior court of the State of California, the Hon. W. Michael Hayes, Judge presiding; the Plaintiff, Lynn Magnandonovan, appearing by attorneys King & Hanagami, ALC, and Samuel J. Wells, APC; and Defendant City of Los Angeles appearing by attorneys Baker & Hostetler, LLP.

A jury of twelve (12) persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court,

and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into Court with its verdict as follows:

1. Did Ms. Magnandonovan complain of discrimination and/or retaliation?

   ___X___ Yes _____ No

2. Did the City of Los Angeles discharge Ms. Magnandonovan?

   ___X___ Yes _____ No

3. Were any of Ms. Magnandonovan's complaints of discrimination and/or retaliation a motivating reason for the City of Los Angeles's decision to discharge Ms. Magnandonovan?

   ___X___ Yes _____ No

4. Was the City of Los Angeles's retaliatory conduct a substantial factor in causing harm to Ms. Magnandonovan?

   ___X___ Yes _____ No

5. What are Ms. Magnandonovan's damages?

   (a) Past economic loss, including lost earnings, lost employment benefits, and medical expenses: $248,036.00

   (b) Future economic loss, including lost earnings, lost earning capacity, lost pension benefits, and medical expenses: $1,027,902.00

(c) Past non-economic loss, including grief, anxiety, humiliation, mental suffering, and emotional suffering:	$250,000.00
(d) Future non-economic loss, including grief, anxiety, humiliation, mental suffering, and emotional suffering:	$0.00
TOTAL	$1,525,938.00

It appearing by reason of said verdict that Plaintiff is entitled to judgment against Defendant.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said Plaintiff Lynn Magnandonovan have and recover from Defendant City of Los Angeles the sum of One Million Five Hundred Twenty-Five Thousand, Nine Hundred Thirty-Eight Dollars ($1,525,938.00) with interest thereon at the rate of ten percent (10%) per annum from the date of the entry of this judgment until paid, together with costs and disbursements in an amount to be determined.

DATED: 5-2-06

W. Michael Hayes
HON. W. MICHAEL HAYES
Judge of the Superior Court

Court of Appeal, Second Appellate District,
Div. 5 – No. B192892

S168496

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LYNN MAGNANDONOVAN,
Plaintiff and Respondent,

v.

CITY OF LOS ANGELES,
Defendant and Appellant.

(Filed Feb. 11, 2009)

The petition for review is denied.

The request for an order directing publication of the opinion is denied.

Werdegar, J. was absent and did not participate.

GEORGE
Chief Justice

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
DIVISION FIVE
RONALD REAGAN BUILDING
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

[LOGO]

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JUDICIAL ASSISTANT
TERRI MEADOWS

January 18, 2007

Samuel J. Wells
A Professional Corporation
Suite 500
11661 San Vincente Boulevard
Los Angeles, California 90049-5113

Re: Magnandonovan v. City of Los Angeles, et al,
Court of Appeal case No. B192892

Dear Mr. Wells:

Administrative Presiding Justice Roger Boren has provided me with your January 10, 2007 letter.

At the outset, thank you for raising the disqualification issue at an early stage of appellate proceedings. It is better to have the issue evaluated now rather than have the question presented after all the briefs are in and a draft opinion has been prepared.

After reviewing the facts as they are now evident, I have concluded that a person aware of the facts, including the states of minds of the four Division Five justices, would *not* entertain a doubt as to our capacity to remain impartial. At present, the Division Five justices decline to recuse themselves. If facts develop at a later date that cause any or all of us to change our minds, we will of course individually or collectively recuse ourselves.

Finally, I do not want you or your client to feel uncomfortable about having raised the issue. In the early 1980's, I represented an accused and challenged the assignment of a Retired Court of Appeal Presiding Justice to sit as an Acting Presiding Justice by the late Chief Justice Rose Elizabeth Bird in a petition for hearing as the document was referred to then. I requested that Chief Justice Bird recuse herself. Because her own assignment of the Retired Presiding Justice was at issue, she obviously recused herself. Later, the remaining members of the court found that the assignment was contrary to law. At first, I cringed at the mere thought of how Chief Justice Bird must have reacted when she even heard my name. But she continued to treat me with respect and affection in the years I remained as a lawyer and then later when I became a judge. The same is true in

this case. It is your duty to have raised the disqualification question and I assure you that your performance of your obligation on behalf of your client is respected. (As to the Retired Presiding Justice, Bernard Jefferson, whose assignment I challenged, we remained friends throughout the remainder of his life too.)

Very truly yours,

/s/ Paul Turner
Paul Turner
Presiding Judge

PT:tm
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(2)

No. 08-1278

In The

Supreme Court of the United States

LYNN MAGNANDONOVAN,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Five

BRIEF IN OPPOSITION

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Respondent City of Los Angeles submits a Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Lynn Magnandonovan to review the judgment of the California Court of Appeal, Second Appellate District, Division Five, filed on October 29, 2008. Respondent asks that certiorari review be denied.

On January 10, 2007, petitioner's trial counsel sent a letter to the Second Appellate District's Administrative Presiding Justice Roger Boren requesting the Second District to recuse itself. Pet. at p. 4.

Justice Laurie Zelon, while still a judge of the Los Angeles County Superior Court, had testified that petitioner had appeared in her courtroom in 2001 on a discovery motion in a criminal proceeding. She testified that petitioner was at times disrespectful. Pet. App. at pp. 38, 46-47.

Administrative Presiding Justice Boren requested Division Five's Presiding Justice, Paul Turner, to respond to counsel's request for recusal. Presiding Justice Turner wrote,

> After reviewing the facts as they are now evident, I have concluded that a person aware of the facts, including the states of minds of the four Division Five justices, would not entertain a doubt as to our capacity to remain impartial. At present, the Division Five justices decline to recuse themselves. If facts develop at a later date that cause any or all of us to change our minds, we will of course individually or collectively recuse ourselves.

Pet. App. at p. 65.

The question presented is whether the Due Process Clause of the Fourteenth Amendment required the California Court of Appeal, Second Appellate District to recuse itself.

PERCEIVED MISSTATEMENTS OF FACT OR LAW

Pursuant to Supreme Court Rule 15.2, respondent suggests that the following misstatement of fact or law appears in the petition:

> The justices of the California Court of Appeal should have recused themselves because their decision depended on the majority's subjective assessment of the strength and credibility of trial testimony by another justice of the same appellate court who, while previously a trial judge, had testified against plaintiff at her trial.

Pet. at p. 3.[1]

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[1] The testimony of Justice Zelon was relevant but cumulative. On May 17, 2002, then Superior Court Judge (now Court of Appeal Associate Justice) Zelon was interviewed by Deputy City Attorney Zna Portlock Houston, who conducted the city's investigation into the charges against petitioner. Judge Zelon stated that petitioner had appeared in her courtroom in 2001 on a discovery motion and was difficult and disrespectful to the court. Pet. App. at pp. 38-39.

By the time of trial, Judge Zelon had been appointed to the Court of Appeal. Associate Justice Zelon described petitioner's conduct during superior court proceedings. Justice Zelon described

(Continued on following page)

This sentence misstates the holding of the California Court of Appeal. The majority opinion does not depend "on the majority's subjective assessment of the strength and credibility of trial testimony by another justice of the same appellate court who, while previously a trial judge, had testified against plaintiff at her trial." To the contrary, the California Court of Appeal held that the city "presented strong, extensive largely uncontradicted evidence plaintiff, a public prosecutor, had repeatedly conducted herself in a wholly unacceptable manner – which led to four members of the city attorney's office to agree that plaintiff's employment should be terminated . . . " Pet. App. at p. 28.

A. Background

The appeal which is the subject of the petition involves a retaliation case in which petitioner, a now "terminated deputy city attorney, among other things admitted she angrily threatened a superior court commissioner that he would have to answer to his creator for a judicial ruling." Pet. App. at p. 2.

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one incident saying: "As best I can recall it now, she referred to the fact that she represented the six million citizens of the City of Los Angeles and that I should explain to them why I was delaying the trial in this case." Justice Zelon testified, "I believe that remarks of that nature in open court on the record show a profound disrespect for the role of the court in a criminal prosecution and the rights of the parties." Pet. App. at p. 47.

The City of Los Angeles, appealed from a judgment, after a jury trial, in favor of petitioner, Lynn Magnandonovan. The city contended among other things that petitioner failed to exhaust her administrative remedies under the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.) and that there was no substantial evidence that the city's reasons for discharging petitioner were a pretext for unlawful retaliation. Pet. App. at pp. 2-3.

The court rejected the city's arguments that petitioner failed to exhaust her FEHA administrative remedies by failing to file a retaliation claim. Pet. App. at p. 12.

The Court of Appeal then addressed the question of whether the FEHA cause of action was supported by substantial evidence. The city argued that there was no substantial evidence to support petitioner's contention that the city's reasons for discharging her were a pretext for illegal retaliation. Pet. App. at p. 3.

In reliance upon *Yankowitz v. L'Oreal USA, Inc.*, 36 Cal.4th, 1028, 1042 (2005); *Arteaga v. Brink's, Inc.*, 163 Cal.App.4th 327, 356 (2008); and *Flait v. North American Watch Corp.*, 3 Cal.App.4th 467, 476-479 (1992), the court concluded that this case was subject to the three-stage burden shifting test set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-805 (1973). The court said petitioner established a prima facie case for retaliation, but "her pretext evidence was insufficient as a matter of law to support a reasonable inference defendant acted with an illegal

motive." Pet. App. at p. 22. In support of this conclusion the court relied upon three cases: *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 355 (2000); *Reeves v. Safeway Stores, Inc.*, 121 Cal.App.4th 95, 112 (2004) and *Yankowitz v. L'Oreal USA, Inc.*, supra, 36 Cal.4th, 1028, 1042. Pet. App. at pp. 19-20.

The court held that,

> There was substantially uncontradicted evidence plaintiff had a long history of inappropriate conduct before judicial officers, for which she had been counseled, and which culminated in the incident involving then Commissioner, now Judge, Biderman. This history of unprofessional conduct, and of complaints about plaintiff's behavior, was documented in the notice of proposed termination and its attachments, and corroborated by testimony at trial, including that of judges, coworkers, and supervisors in the city attorney's office. Much of the evidence came from superior court judges before whom plaintiff had appeared and who had been interviewed during the city's investigation. These judges had no knowledge of plaintiff's initial Department of Fair Employment and Housing administrative complaint. Or even if they did, none of the judges had any motivation to retaliate against plaintiff for filing the Department of Fair Employment and Housing administrative complaint. Moreover, Mr. Delgadillo, the city attorney, cannot be expected to retain as a public prosecutor – a position of great power and even greater

> responsibility – an attorney who conducts herself or himself in a manner antithetical to that position.

Pet. App. at p. 29.

B. Petitioner's Own Testimony Provided The City With A Legitimate Non-Retaliatory Reason For Terminating Her Employment.

The California Court of Appeal observed that the incident that was the immediate trigger of the city's investigation into complaints about petitioner's misconduct occurred on November 27, 2001, in Commissioner (now Judge) Joseph Biderman's courtroom. At trial petitioner admitted to the following:

> On November 27, 2001, she failed to timely appear for a probation violation hearing in Commissioner Biderman's courtroom. Plaintiff [Petitioner Lynn Magnandonovan] telephoned Commissioner Biderman's courtroom clerk, Ms. Jones. Plaintiff learned that when she failed to appear, Commissioner Biderman had taken the matter off calendar. Plaintiff believed that as a result of Commissioner Biderman's action, the defendant's probation would be terminated. Ms. Jones read Commissioner Biderman's minute order to plaintiff. Thereupon, plaintiff told Ms. Jones that part of what Commissioner Biderman had written in the court file was a lie. Plaintiff accused Commissioner Biderman of having a "personal vendetta" against her. Plaintiff said she was so upset about what Commissioner

> Biderman had done that, '[M]aybe I would file a complaint against him.' In the telephone conversation, plaintiff told Ms. Jones that Commissioner Biderman "would have to answer to the creator" for his actions.

Pet. App. at p. 18.

The California Court of Appeal held that additional trial testimony indicated that,

> Ms. Jones advised Commissioner Biderman about the telephone call. Ms. Jones told Commissioner Biderman plaintiff: "was very angry, agitated, [and] upset"; was yelling, arguing about why the case was taken off calendar; and demanded to know why the matter was taken off calendar. Ms. Jones also told Commissioner Biderman that plaintiff said he "would be answering to God for what" had occurred. Commissioner Biderman understood plaintiff's remarks as a "veiled reference" to his homosexuality. Commissioner Biderman "felt sick about" plaintiff's remarks. Commissioner Biderman testified he: "felt very personally insulted"; "was very upset about it"; and "was in shock about the whole thing." Commissioner Biderman reported the incident to Judge Stephanie Sauter. Judge Sauter in turn reported the matter to plaintiff's supervisor, Maureen Siegel. Maureen Siegel reported the incident to Earl Thomas. Mr. Thomas reported what had occurred to Chief Deputy City Attorney Terree Bowers.

Pet. App. at pp. 18-19.

With respect to Petitioner's admissions and this testimony the California Court of Appeal held that there, "was sufficient evidence defendant had a legitimate, non-retaliatory reason for terminating plaintiff's employment as a deputy city attorney." Pet. App. at p. 19.

Therefore contrary to the misstatement in the petition, the Court of Appeal decision does not depend on the "strength and credibility" of Justice Zelon.

REASONS FOR NOT GRANTING THE PETITION

The petition for writ of certiorari should be denied because this Court lacks jurisdiction to reach the constitutional issue that the petition presents. However, in the event that the Court nevertheless determines that it has jurisdiction, the Court should deny the petition. Petitioner has not demonstrated any compelling reason why this Court should exercise its discretion to accept the petition, nor has petitioner demonstrated that a question of substantial constitutional importance is presented.

A. This Court Lacks Jurisdiction.

California Code of Judicial Ethics, Canon 2(A) provides: "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

"The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality and competence." California Code of Judicial Ethics, Canon 2, Advisory Committee Commentary.

California Code of Judicial Ethics, Canon 3(E)(4)(c) provides that an appellate justice shall be disqualified if "the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial. . . ." Each justice independently decides whether recusal is in order. *Kaufman v. Court of Appeal,* supra, 31 Cal.3d 933, 937-940.

Petitioner's recusal request was based on these provisions of state law. Pet. at p. 5. In denying the recusal request, therefore, Presiding Justice, Paul Turner understandably addressed only whether a reasonable person "would not entertain a doubt as to our capacity to remain impartial." Pet. App. at p. 65.

By failing to raise her due process theory in the court below, petitioner deprived the California courts of the opportunity to address it, but this Court is "a court of review, not of first view" *Cutter v. Wilkinson,* 544 U.S. 709, 718 n.7 (2005).

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the

> validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal law challenge to a state court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (per curiam). This Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497 (1981).

"Passing invocations of 'due process'" that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a federal claim was presented." *Adams v. Robertson*, 520 U.S. 83, 89, n.3 (1997) (per curiam).

When the state court decision is silent on the federal issue, as in this case, this Court assumes that the issue was not properly presented to the highest

state court and the petitioner bears the burden of defeating this assumption "by demonstrating that the state court had 'fair opportunity to address the federal question. . . .'" *Adams*, 520 U.S. at 86-87 (quoting *Webb v. Webb,* 451 U.S. 493, 501 (1981)).

In *Yee v. City of Escondido*, 503 U.S. 519 (1992), Yee did not include a due process claim in his complaint, nor did he raise it in the California Court of Appeals. It was not until his petition for review to the California Supreme Court that Yee finally raised a substantive due process claim, but the California Supreme Court denied discretionary review. This Court stated that "[s]uch a denial, as in this Court, expresses no view as to the merits." *Id.* at 533. As such, this Court reasoned that the state court did not address the federal claim; therefore, the United States Supreme Court would not consider it. *Id.*

In the present case, Petitioner's due process claim was not presented to the California Court of Appeal and therefore Petitioner has failed to make the requisite jurisdictional showing required by both statute and Supreme Court precedent.

B. There Is No Compelling Reason For This Court To Exercise Its Discretion To Review This Case And Resolution Of The Issues Raised By *Caperton v. A.T. Massey Coal Co.* Will Not Aid Petitioner.

Supreme Court Rule 10 identifies certain considerations that bear upon whether the Court should

exercise its discretion to review a matter presented on a certiorari petition. These considerations do not suppose review in this case. The California Court of Appeal decision neither conflicts with any decisions of this Court, nor implicates a federal question that has not been decided by this Court.

This Court has held that a fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955).

This Court has explained that bias in judicial decision making refers to "a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate either because it is undeserved, . . . rests upon knowledge that the subject ought not to possess[,] . . . [or] is excessive in degree. . . ." *Liteky v. United States*, 510 U.S. 540, 550 (1994). In this context, the Court set forth the standard for finding judicial bias:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such

> a high degree of favoritism or antagonism as to make fair judgment impossible.

Id. at 555.

Petitioner offers only conjecture in support of her claim that the California Court of Appeal justices are impermissibly biased.[2]

The majority opinion does not reflect "a high degree" of favoritism or antagonism. In addition, the record in this case shows that petitioner's request for recusal was treated with considerable courtesy and respect.

In his response to petitioner's recusal request, Presiding Justice Turner stated that in the 1980's he, as a practicing attorney, moved to disqualify retired Presiding Justice Bernard Jefferson from sitting on a case when a petition for hearing was pending. Then Chief Justice Rose Bird recused herself from deciding the issue because she assigned Justice Jefferson to the case. Pet. App. at pp. 65. Presiding Justice Turner then wrote:

> Later, the remaining members of the court found that the assignment was contrary to law. At first, I cringed at the mere thought of

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[2] Petitioner theorizes as follows: "The majority's inevitable respect for their colleague Justice Zelon would lead a reasonable person to doubt the court's ability to be impartial in assessing the trustworthiness of that testimony. The justices should have recused themselves on the ground that '[a] judge must avoid all impropriety and appearance of impropriety.' ABA Model Code of Judicial Conduct, Canon 2(A) cmt." Pet. at p. 6.

> how Chief Justice Bird must have reacted when she even heard my name. But she continued to treat me with respect and affection in the years I remained as a lawyer and then later when I became a judge. The same is true in this case. It is your duty to have raised the disqualification question and I assure you that your performance of your obligation of your client is respected. (As to Retired Presiding Justice, Bernard Jefferson, whose assignment I challenged, we remained friends throughout the remainder of his life too.)

Pet. App. at pp. 65-66.

Finally, petitioner argues that,

> [i]n a case currently pending before this Court – *Caperton v. A.T. Massey Coal Company, Inc.*, No. 08-22 – [*Caperton v. A.T Massey Coal Co.*, 129 S.Ct. 593 (2008)] the Court will decide whether an appellate justice's failure to recuse himself from participating in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment by creating an appearance of bias . . .
>
> This Court's decision in *Caperton* will likely determine whether recusal was required under the circumstances of the present case.

Pet. at p. 7.

Any claim of bias must be supported by facts which would raise a reasonable inference of a lack of

impartiality on the part of the California Court of Appeal justices. *Caperton* raises the issue of whether the amount and timing of campaign contributions can be significant enough to establish the probability of bias.

Petitioner has failed to present any facts to support an inference of bias in this case. In the present case, Division Five's Presiding Justice, Paul Turner, denied petitioner's recusal request by stating, "[a]fter reviewing the facts as they are now evident, I have concluded that a person aware of the facts, including the states of minds of the four Division Five justices, would not entertain a doubt as to our capacity to remain impartial." Pet. App. at p. 65.

This conclusion comports with the fact that appellate judges, are called upon on an almost daily basis to review the decisions of other judges regardless of whether they sit on the same or another court; it is a routine part of their work and friendship or collegiality plays no part in their decisions.

The Second Circuit addressed a similar issue in *United States v. Colon*, 961 F.2d 41 (2d Cir. 1992). In this case the defendant argued that recusal of Judge Walker was required because the Second Circuit would be reluctant to reverse a sentence imposed by Judge Walker since he was now a member of that Court. The Second Circuit dismissed this argument stating, "citation is not necessary to recall that this Court has not hesitated to exercise its oversight responsibilities without regard to the fact that the decision being reviewed was rendered by a member of our bench." *Id.* at 44.

The California Court of Appeal decision is consistent with this holding. There is no reason to believe that this Court's decision in *Caperton* will mandate a different result.

CONCLUSION

For all of the foregoing reasons, the petition fails to state sufficient grounds for review by this Court, and should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

LYNN MAGNANDONOVAN,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari
To The California Court Of Appeal
Second Appellate District, Division Five

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Plaintiff Lynn Magnandonovan respectfully submits this brief in reply to defendant City of Los Angeles's brief in opposition to plaintiff's petition for a writ of certiorari. This reply brief addresses two arguments in defendant's opposition brief: (1) that this Court lacks jurisdiction because the due process issue asserted in the petition for a writ of certiorari was not adequately presented below, *see* Oppo. at 8-11; and (2) that a lack of judicial impartiality below cannot reasonably be inferred here, even though the appellate panel's decision was based on an assessment of the credibility of a colleague's trial testimony, because appellate judges routinely review the decisions of other judges, *see* Oppo. at 15. The first argument lacks merit because this Court has jurisdiction to remand a case for consideration of a due process issue regardless of whether that issue was adequately presented below. The second argument lacks merit because an appellate court's assessment of the credibility of a colleague's trial testimony is not analogous to appellate review of a colleague's decision in a case.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO, AND SHOULD, REMAND THE CASE FOR CONSIDERATION OF THE DUE PROCESS ISSUE IN LIGHT OF THE COURT'S FORTHCOMING *CAPERTON* DECISION.

Defendant contends this Court lacks jurisdiction to grant certiorari because, according to defendant, plaintiff did not adequately present her due process claim to the California Court of Appeal. Oppo. at 10-11. Defendant does *not* address plaintiff's alternative request that, if this Court does not grant certiorari, the Court vacate the judgment of the California Court of Appeal and remand the case for further consideration in light of this Court's forthcoming decision in *Caperton v. A.T. Massey Coal Company, Inc.* *See* Pet. at 7-8.

Plaintiff was unable to raise the due process issue below prior to the California Court of Appeal's decision because the issue did not become evident until the decision was issued, when, with no prior warning, the court undertook to assess the strength and credibility of its colleague's trial testimony. Thereafter, plaintiff timely raised the issue in a petition for rehearing filed in the California Court of Appeal. *See* App. 1. In the petition for rehearing, plaintiff argued that the California Court of Appeal should have recused itself because of an appearance of impropriety. *See* App. 11-13. This Court will decide in *Caperton* whether such appearance of impropriety violates due process. Thus, by asserting the appearance

of impropriety, plaintiff's petition for rehearing presented the due process issue.

Regardless, however, of whether plaintiff adequately presented the due process issue below, this Court has jurisdiction, "in the interests of justice," either to consider whether a due process violation is "apparent on the particular facts of [the] case," or to remand the case to the California Court of Appeal for consideration of the due process issue in light of *Caperton*, with the latter being "for prudential reasons . . . preferable." *Wood v. Georgia*, 450 U.S. 261, 265-66 & n. 5 (1981). That is why plaintiff's petition for a writ certiorari includes a request that this Court remand the case to the California Court of Appeal for further consideration in light of *Caperton*. For prudential reasons that is the preferable course of action. It is indisputable that this Court has jurisdiction to take that course.

II. APPELLATE REVIEW OF A COLLEAGUE'S DECISION IS NOT ANALOGOUS TO AN ASSESSMENT OF THE CREDIBILITY OF A COLLEAGUE'S TRIAL TESTIMONY.

On the merits, defendant contends that a lack of judicial impartiality cannot reasonably be inferred here because appellate judges "are called upon on an almost daily basis to review the *decisions* of other judges regardless of whether they sit on the same or another court; it is a routine part of their work and friendship or collegiality plays no part in their

decisions." Oppo. at 15, emphasis added. This analogy is fundamentally flawed. There is an immense difference between routine appellate review *of a decision* by another judge and the situation here, where the appellate court undertook to assess the *credibility of trial testimony* by a colleague who sits on the same court. That is hardly routine; it is extraordinarily unusual.

It is one thing for an appellate court to determine whether a colleague committed legal error in deciding a case; it is quite another for an appellate court to decide whether trial testimony by a member of the same bench is trustworthy. The judicial process routinely and necessarily relies on appellate courts to do the former. It is probably asking too much of appellate courts, however, to do the latter, and it is certainly asking too much of the public to accept such a thing unquestioningly. The appearance of impropriety is manifest.

CONCLUSION

For the foregoing reasons, even if this Court determines that the due process issue was not adequately presented below, the Court can and should remand the case to the California Court of Appeal for consideration in light of this Court's decision in *Caperton*.

Respectfully submitted,

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B192892

IN THE COURT OF APPEAL
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SECOND APPELLATE DISTRICT
DIVISION FIVE

LYNN MAGNANDONOVAN,

Plaintiff, Respondent and Cross-Appellant,

vs.

CITY OF LOS ANGELES,

Defendant, Appellant and Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
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PETITION FOR REHEARING

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STATUTES AND RULES

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[1] INTRODUCTION

The majority opinion in this case re-weighs the trial evidence in a traditional substantial evidence appeal. The legal authorities on which the majority relies do not support such appellate second-guessing of this jury verdict following a trial with live witness testimony.

In re-weighing the trial evidence, the majority relies on the three-stage burden-shifting test set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*). Under that test, according to *Guz v. Bechtel* [2] *National, Inc.* (2000) 24 Cal.4th 317 (*Guz*) and *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133 (*Reeves*), an appellate court

may re-weigh the evidence presented on a pre-verdict motion such as a motion for summary judgment.

Those authorities are inapposite here. The majority has not followed this Division's own holding in *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189 (*Caldwell*) that the *McDonnell Douglas* burden-shifting test "'drops from the case'" if and when "the case is submitted to the jury." (*Caldwell, supra,* at p. 204.) Once a case goes to a jury, the *McDonnell Douglas* construct disappears, and on appeal the traditional substantial evidence test applies – meaning the Court of Appeal may *not* re-weigh the trial evidence, as the majority has done here.

The court should grant a rehearing to allow review of the judgment for sufficiency of the evidence under the proper standard of appellate review, which precludes the court from re-weighing appellant's trial evidence and second-guessing the jury.

Also, we respectfully request that the court recuse itself upon granting a rehearing. Once it became evident during the court's decision-making process that the majority's re-weighing of the evidence would turn in part on the strength of trial testimony by one of the justices' colleagues on the Second Appellate District, the court should have recused itself – regardless of the absence of any actual misconduct – in order to avoid an *appearance* of impropriety. The court can remedy its not doing so by recusing itself now.

Finally, we point out that the court has omitted to address one of the issues plaintiff has presented, concerning her claim for deprivation of constitutional due process under 42 U.S.C. § 1983.

[3] DISCUSSION

I.

THE MAJORITY HAS APPLIED AN UNRELATED STANDARD OF REVIEW TO REWEIGH THE TRIAL EVIDENCE IN A TRADITIONAL SUBSTANTIAL EVIDENCE APPEAL.

The majority opinion makes clear why this judgment has been reversed: Two justices of this court believe that plaintiff's evidence was insufficient as a matter of law because defendant's evidence was "strong" while plaintiff's evidence was "weak." (Maj. opn. at pp. 3, 20, 35.) This is *re-weighing* the evidence presented to a jury – something appellate courts are not supposed to do, according to innumerable recitations of the substantial evidence rule.

The majority opinion would create a new exception to the post-trial substantial evidence rule – solely for employment discrimination cases – based on a misapplication of the *McDonnell Douglas* burden-shifting test. Under that test, on an appeal challenging a summary judgment ruling, the Court of Appeal may re-weigh the plaintiff's documentary evidence by assessing "'the strength of the plaintiff's prima facie case'" of retaliation, and may rule for the

defendant on the issue of retaliatory motive if that evidence raises only "a weak inference of prohibited bias." (*Guz, supra,* 24 Cal.4th at p. 362 & fn. 25.) The majority here, however, has relied on the *McDonnell Douglas* construct to re-weigh *live witness testimony at trial* – not documentary evidence on a summary judgment motion – and has reversed the judgment because, in the majority's view, the plaintiff's "weak" evidence of retaliatory motive (*id.* at pp. 3, 35) was outweighed by defendant's "strong" evidence of non-retaliatory motive (*id.* at pp. 3, 20).

[4] But the *McDonnell Douglas* construct – with its special rule allowing the appellate court to re-weigh documentary evidence presented on a motion for summary judgment – *disappears* once the case is submitted to a jury, and is replaced by the traditional substantial evidence rule. This court (Division Five of the Second Appellate District) itself said so in *Caldwell, supra,* Cal.App.4th at page 204: "[I]f and when the case is submitted to the jury, the construct of the shifting burdens 'drops from the case,' and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race- or age-neutral reasons for the employment decision."

Other authority is in accord with *Caldwell*: "Once the case is submitted to the jury – and, therefore, for substantial-evidence review on appeal – these frameworks [prescribed by *McDonnell Douglas*] drop from the picture and *traditional substantial evidence review* takes their place in the analysis." (*Horsford v.*

Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 375, italics added.) Such traditional substantial evidence review means it is up to the *jury* "to decide the ultimate question: whether the employee has proven that the employer intentionally discriminated against the employee." (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1117.) It is left to the trier of fact "to decide which evidence it found more convincing." (*Id.* at p. 1118.) The appellate court's role "is simply to review the record to determine whether there was sufficient *substantial evidence*" to support the judgment. (*Id.* at p. 1120, italics added.) The appellate court "is not in a position to weigh any conflicts or disputes in the evidence, or to assess the credibility of the witnesses; that is the province of the trial court alone." (*Id.* at p. 1121.) As Justice Richard M. Mosk observed in his dissenting opinion here: "In light of the standard governing our substantial evidence [5] review, this court cannot reweigh the evidence." (Dis. opn. at p. 4.)

It makes jurisprudential sense that an appellate court cannot use the *McDonnell Douglas* construct to justify re-weighing the trial evidence in an employment discrimination case. Unlike summary judgment proceedings, which are on a paper record that the appellate court is just as well positioned as the trial court to assess, fact-finding in a jury trial depends on live witness testimony that the jury is uniquely positioned to assess. "The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy,

their calmness or consideration." (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243.) That is why the jury is "the *exclusive* judge of the credibility of the witnesses." (*Ibid.*, original italics.) And that is why the *McDonnell Douglas* construct cannot be used to justify appellate second-guessing of the jury's verdict here. Because of the jury's superior position as the arbiter of live witness credibility, it is left to the jury – even in an employment discrimination case – "to decide which evidence it found more convincing." (*Muzquiz v. City of Emeryville, supra,* 79 Cal.App.4th at p. 1118.)

The majority opinion cites *Guz, supra,* 24 Cal.4th 317, as support for re-assessing the strength of plaintiff's trial evidence in this case. (Maj. opn. at p. 20.) The court in *Guz* did in fact re-weigh the evidence there. (*See Guz, supra*, 24 Cal.4th at p. 362, fn. 25 ["Guz's circumstantial evidence of intentional discrimination, even if fully credited and technically sufficient to establish a prima facie case, raises, at most, a weak inference of prohibited bias."].) But *Guz* itself makes clear that the re-weighing in that case depended on the procedural posture of the appeal as being from a *summary judgment* ruling. The very first sentence of *Guz* states: "This case presents questions about the law governing claims of wrongful discharge from employment *as it* [6] *applies to an employer's motion for summary judgment*." (*Guz, supra,* 24 Cal.4th at p. 325, italics added.) As Justice Kennard observed, the court was "concerned not with the sufficiency of evidence to sustain a jury verdict of age

discrimination, but only with whether Guz's evidence raises 'a triable issue of material fact' " under Code of Civil Procedure section 437c. (*Guz, supra,* at p. 384 (dis. opn. of Kennard, J.).) *Guz* says nothing about the law governing claims of wrongful discharge as it applies to appellate review of a *jury verdict*.

The majority opinion also relies on *Reeves, supra,* 530 U.S. 133, which is the source of *Guz's* re-weighing of the documentary evidence in that summary judgment appeal. (Maj. opn. at pp. 16-17.) But *Reeves*, too, did not address appellate review of a jury verdict. The issue in *Reeves* was whether the federal district court should have granted a motion for *judgment as a matter of law* – the federal procedural equivalent of a nonsuit or directed verdict – which, under rule 50 of the Federal Rules of Civil Procedure, "may be made at any time *before the case is submitted to the jury.*" (Fed. Rules Civ.Proc., rule 50(a)(2), 28 U.S.C., italics added.) In that context, the court observed that "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. [Citation.] To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from *review under Rule 50. . . .*" (*Reeves, supra*, 530 U.S. at p. 148, italics added.) This observation says nothing about appellate review *after*

submission of the case to the jury. Indeed, Justice Ginsburg, in a concurring opinion, elaborated that "the ultimate question of liability ordinarily should not be taken from the jury" once the [7] plaintiff has presented prima facie evidence from which the jury could infer a retaliatory motive, and that "the Court's opinion leaves room for such further elaboration in an appropriate case." (*Id.* at p. 155 (conc. opn. of Ginsburg, J.).) *Reeves*, like *Guz*, says nothing about the law governing claims of wrongful discharge as it applies to appellate review of a *jury verdict*.

No California appellate court – in a published or unpublished opinion – has ever used *Guz, Reeves,* or *McDonnell Douglas* to re-weigh trial evidence on appeal after a jury verdict. This court should not be the first to do so. The most fundamental rule of appellate review forbids it.

II.

THE COURT SHOULD HAVE RECUSED ITSELF ONCE IT BECAME EVIDENT THAT THE MAJORITY'S DECISION WOULD TURN IN PART ON THE STRENGTH OF TESTIMONY BY A WITNESS WHO NOW SITS AS A COLLEAGUE AT THE SECOND APPELLATE DISTRICT.

On January 10, 2007, plaintiff's trial counsel wrote to Administrative Presiding Justice Roger W. Boren and Presiding Justice Paul Turner to advise

them that, because several witnesses in this case were sitting Los Angeles Superior Court judges, that entire court had recused itself and the matter had been tried before a judge of the Orange County Superior Court. Counsel asked that the Second Appellate District likewise recuse itself, on the ground that a person aware of the facts might reasonably entertain a doubt that the justices would be able to be impartial. Counsel pointed out that Justice Laurie Zelon, formerly a judge of the Los Angeles Superior Court and now a justice of the [8] Second Appellate District, had testified against plaintiff at trial, highlighting the potential for an appearance of impropriety.

Presiding Justice Turner responded by letter dated January 18, 2007. The letter stated: "After reviewing the facts as they are now evident, I have concluded that a person aware of the facts, including the states of minds of the four Division Five justices, would *not* entertain a doubt as to our capacity to remain impartial. At present the Division Five justices decline to recuse themselves. *If facts develop at a later date* that cause any or all of us to change our minds, we will of course individually or collectively recuse ourselves." (First italics in original, second italics added.)

It is now evident that, during this court's decision-making process, facts did indeed develop that should have caused the court to recuse itself – facts that would lead "a reasonable person aware of the facts [to] doubt the [court's] ability to be

impartial." (Cal. Code Jud. Ethics, canon 3E(4)(c), italics added; see *Housing Authority of Monterey County v. Jones (2005) 130 Cal.App.4th 1029,* 1040, fn. 6.) Once the majority determined that it would not apply the traditional substantial evidence rule, but instead would re-weigh the evidence – relying in part on the strength of Justice Zelon's testimony (see maj. opn. at pp. 27-28, 33) – the majority's inevitable trust in their colleague's credibility would lead a reasonable person to doubt their ability to be impartial in assessing the strength of that testimony. At that point in the decision-making process, this court should have recused itself on the ground that "[a] judge shall avoid impropriety *and the appearance of impropriety* in all of the judge's activities." (Cal. Code Jud. Ethics, canon 2, italics added.)

We do not mean for an instant to suggest that the majority or Justice Zelon actually engaged in any misconduct. We presume that nothing of the sort has ever occurred here. But that is beside the point. This court is held to [9] a higher standard than that of the work-a-day attorney. (See *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 308, fn. 14.) Judges not only must refrain from *actual* misconduct, but also must refrain from conduct that creates even an *appearance* of impropriety – conduct that, "'no matter how innocent and well intentioned, can only undermine public confidence in the integrity and impartiality of the judiciary.'" (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 774; see also *Yaqub v. Salinas Valley Memorial Healthcare System* (2004)

122 Cal.App.4th 474, 486 ["The question is not whether the judge is actually biased, but 'whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.'"].) Recusal is required whenever the facts would lead a reasonable lay person simply to "'doubt'" a judge's ability to be impartial. (*In re Wagner* (2005) 127 Cal.App.4th 138, 148 ["'we need not determine whether there is actual bias'"].)

We believe that such facts exist here. Once it became evident that the majority's decision would turn in part on the strength of testimony by a trusted colleague, the court should have recused itself to avoid even the *appearance* of impropriety. Accordingly, we respectfully ask this court, upon granting a rehearing, to recuse itself for transfer of the case to another appellate district.

III.

THE COURT HAS NOT ADDRESSED PLAINTIFF'S SECTION 1983 CLAIM.

In our letter brief of October 17, 2008, we asserted that this court may affirm the judgment based on treatment of plaintiff's third and fourth causes of action as tendering a statutory claim for deprivation of constitutional due [10] process under 42 U.S.C. § 1983, or may remand the cause for a retrial on that claim. The court's decision does not address this point. It should be addressed on rehearing.

CONCLUSION

For the foregoing reasons, the court should grant a rehearing to allow review of the judgment for sufficiency of the evidence under the proper standard of appellate review, as well as for a decision on plaintiff's section 1983 claim, and should recuse itself for transfer of the case to another appellate district.

Dated: November 6, 2008

Respectfully submitted,

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[11] CERTIFICATE OF WORD COUNT

The text of this petition consists of 2,532 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: November 6, 2008

JON B. EISENBERG